IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1166

STATE OF MINNESOTA, ET AL.,
Petitioners,

and

LOUIS QUAST, ET AL.,
Intervenors,
Petitioners,

and

JAMES P. LARKIN, ET AL.,
Intervenors,
Petitioners,

vs.

MINNESOTA CIVIL LIBERTIES UNION, ET AL.,
Respondents,

and

MINNESOTA COORDINATING COMMITTEE FOR PUBLIC EDUCATION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR WRIT OF CERTIORARI BY THE STATE OF MINNESOTA, ET AL.

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TABLE OF CONTENTS

PAGE

Table of Authorities ..... iii, iv

Petition for Writ of Certiorari to the Supreme Court of the State of Minnesota 4

Opinions Below 5

Jurisdiction 5

Issue 5

Applicable Constitutional and Statutory Provisions 6

Statement of the Case 6

A. The State Statute 6

B. The Challenges 9

C. The Decisions Below 10

1. The Trial Court 10

2. The Decision of the Minnesota Supreme Court 12

Reasons for Granting the Writ 14

A. The Minnesota Supreme Court Has Decided Federal Questions of Substance Not in Accord With Previous Decisions of This Court 14

1. The Establishment Clause 14

2. The Free Exercise Clause 17

PAGE

3. Had the Minnesota Supreme Court Correctly Interpreted *Nyquist* and Its Companion Cases, the Lower Court Would Have Been Affirmed 18

B. Great Uncertainty Is Present in Post-*Nyquist* Decisions So That This Court's Power of Supervision Should Be Exercised 21

Conclusion 25

TABLE OF AUTHORITIES

PAGE

Minnesota Statutes:

Minn. Stat. § 120.10, Subd. 2 7
Minn. Stat. § 124.212 8
Minn. Stat. § 290.086 6
Minn. Stat. § 290.086, Subd. 1 8
Minn. Stat. § 290.086, Subd. 2 8
Minn. Stat. § 290.086, Subd. 3 6
Minn. Stat. § 290.086, Subd. 5 7
Minn. Stat. § 290.087 3

Minnesota Case:

Minnesota Civil Liberties Union v. State of Minnesota, — Minn. —, 224 N.W. 2d 344 (1974) 3, 12, 14, 15, 16, 17, 23, 24

Foreign Cases:

Allen v. Morton, 495 F. 2d 65 (1973) 22, 23
Board of Education v. Allen, 392 U.S. 236, 88 S. Ct. 1923 (1968) 15
Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900 (1940) 6
Committee for Public Education v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955 (1973) 5, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23
Earley v. DiCenso, 403 U.S. 602, 91 S. Ct. 2105 (1971) 16

PAGE

Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504 (1947) 15

Hunt v. McNair, 413 U.S. 734, 93 S. Ct. 2868 (1973) 13, 16, 22

Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, reh. den. 404 U.S. 876 (1971) 10, 11, 12, 16, 18

Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472, 93 S. Ct. 2814 (1973) 13

McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461 (1948) 16

McGowan v. Maryland, 366 U.S. 420, 81 S. Ct. 1101 (1961) 16

Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571 (1925) 18

Sloan v. Lemon, 413 U.S. 825, 93 S. Ct. 2982 (1973) 12

State ex rel. Warren v. Nusbaum, 64 Wis. 2d 314, 219 N.W. 2d 577 (1974) 21, 22

Tilton v. Richardson, 403 U.S. 672, 91 S. Ct. 2091 (1971) 11, 16, 18, 22

Walz v. Tax Commission, 397 U.S. 664, 90 S. Ct. 1409 (1970) 15, 16, 17

Wisconsin v. Yodor, 406 U.S. 205, 92 S. Ct. 1526 (1972) 18

Zorach v. Clauson, 343 U.S. 306, 72 S. Ct. 679 (1952) 16

Miscellaneous:

28 U.S.C. Section 1257(3) 5

IN THE

Supreme Court of the United States

October Term, 1974

No. ———

STATE OF MINNESOTA,
ARTHUR C. ROEMER, Commissioner of Taxation, Income Tax Division, Department of Taxation, State of Minnesota,
GEROME T. CAULFIELD, Coordinator, Income Tax Division, Department of Taxation, State of Minnesota,
VAL BJORNSON, Treasurer, State of Minnesota,
ROLLAND F. HATFIELD, Auditor, State of Minnesota,
HOWARD B. CASMEY, Commissioner of Education, State of Minnesota,
RICHARD L. BYE, DAVID C. BRANDON, DANIEL BURTON, B. ROBERT LEWIS, RALPH H. PETERSON, MARY JO RICHARDSON, GEORGE A. ROSSMAN, HENRY E. SCHROEDER AND LOUIS R. SMERLING, as members of the State Board of Education, State of Minnesota,
SAMUEL L. RICHARDSON, Commissioner, Department of Human Rights, State of Minnesota,

Petitioners,

and

LOUIS QUAST, RICHARD G. CONLIN, JOSEPH L. LEWIS AND MANUEL RIVERA, INTERVENORS,

Petitioners,

and

JAMES P. LARKIN, HARRIS DUININCK, BERT VAN'T HULL, ALBERT F. MARTIN, ROBERT GEORGE ZABEL, AND ROBERT ULRICH, INTERVENORS,

Petitioners,

vs.

MINNESOTA CIVIL LIBERTIES UNION,

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,

MATTHEW STARK, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

DONALD E. KRAUSE, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

KATHLEEN E. HAUSER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

ROLFE E. HAUSER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

CARL LUNDSTROM, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

ELEANOR OTTERNESS, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

WILLIAM B. OTTERNESS, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

Respondents,

and

MINNESOTA COORDINATING COMMITTEE FOR PUBLIC EDUCATION;

SCHOOL ADMINISTRATORS OF MINNESOTA;

MINNESOTA EDUCATION ASSOCIATION;

MINNESOTA FEDERATION OF TEACHERS;

MINNESOTA ASSOCIATION OF SCHOOL ADMINISTRATORS;

MINNESOTA ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS;

MINNESOTA ELEMENTARY SCHOOL PRINCIPALS ASSOCIATION;

MINNESOTA CONGRESS OF PARENT AND TEACHERS ASSOCIATIONS;

AMERICAN JEWISH CONGRESS;

JEWISH COMMUNITY RELATIONS COUNCIL OF MINNESOTA;

FIRST UNITARIAN SOCIETY OF MINNEAPOLIS;

MINNESOTA CONFERENCE OF SEVENTH DAY ADVENTISTS;

BRUCE A. OLANDER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

VALERIE V. OLANDER, by BRUCE A. OLANDER, as her Guardian ad Litam;

MRS. JANET M. SIGFORD, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

EDWARD HENKEN, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

FRANKLIN G. EMRICK, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

TOLLIE J. FLIPPIN, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

MRS. ROBERT ROSE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

EDWARD BOLSTAD, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

A. L. GALLOP, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

JAMES J. ROSASCO, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
DAVID W. MEADE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
MRS. ARVIS NELSON, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
L. E. WERMAGER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
CHARLOTTE CARMAUCHE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
MARY VAN KIRK, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
WAYNE VAN KIRK, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
CALVIN DIDIER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
SAMUEL L. SCHEINER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

Petitioners State of Minnesota, et al., pray that this Court issue its Writ of Certiorari to the Supreme Court of the State of Minnesota to review the judgment of that Court in File No. 43978, dated December 27, 1974.

OPINIONS BELOW

The opinion of the District Court, Second Judicial District (Ramsey County, Minnesota) by Judge J. Jerome Plunkett is not reported but appears in the Appendix hereto, separately printed, beginning at page 71.

The opinion of the Supreme Court of the State of Minnesota by Justice Todd and the concurring opinion by Justice Yetka, are reported in —— Minn. ——, 224 N.W.2d 344 and are reproduced in the Appendix hereto, beginning at page 107.

JURISDICTION

The decision of the Minnesota Supreme Court was filed on November 26, 1974. Petitions for Rehearing were then timely filed but were denied on December 27, 1974. Judgment was also entered on December 27, 1974, which judgment is here sought to be reviewed.

This Court has jurisdiction to review pursuant to 28 U.S.C. § 1257 (3).

ISSUE

Did the Minnesota Supreme Court err in interpreting *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S. Ct. 2955 (1973), as foreclosing all indirect and remote assistance to parents of nonpublic school children through the vehicle of an income tax credit, where the lower court, after an eight-day trial, determined that the statute did not have the principal or primary effect of either advancing or inhibiting religion?

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

The clause was made applicable to the states through the Fourteenth Amendment in *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900 (1940).

The Minnesota Statutes involved, Minn. Stat. §§ 290.086 and 290.087 are set forth in the Appendix beginning at page 134.

STATEMENT OF THE CASE

A. The State Statute.

In 1971, the Minnesota Legislature enacted Chapter 944 (now codified as Minn. Stat. § 290.086 and § 290.087), which provides for an income tax credit on the individual income tax returns of parents or legal guardians of children in kindergarten, elementary and secondary nonpublic schools located in Minnesota. (A. 134-140)

The tax credit is based on 10 months of each calendar year during which a child is enrolled in a nonpublic school. (A. 138) Nonpublic school is defined as "any elementary or secondary school, other than a public school, situated in this state, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, is not operated for profit, and adheres to the provisions of the Civil Rights Act of 1964." Minn. Stat. § 290.086, Subd. 3. (A. 134)

For calendar year 1973 and later, the amount of the credit is the *lesser* of:

1. Amount Paid Limitation—the amount paid by parents for costs of education; or

2. Dollar Amount Limitation—the average public school state foundation aid per pupil unit, divided by the same figure for the prior year, then multiplied by $50.00 for a kindergarten student, $100.00 for an elementary school student and $140.00 for a secondary school student; or

3. Actual Expense Limitation—the restricted maintenance cost per pupil unit in average daily attendance multiplied by the average percentage of state foundation aid to public schools. Minn. Stat. § 290.086, Subd. 5. (A. 135-136)

In summary, the amount of the credit is always the *lesser* of the education costs actually paid by the parents, an adjusted dollar limitation, or the "restricted maintenance cost" per pupil unit multiplied by the state foundation aid percentage.

The Legislature was aware that no part of the parental tax credit could be allocated to the sectarian aspects of education provided in some of the nonpublic schools. The statute thus contains a number of precise limitations which assure both the theoretical and practical severability of secular and sectarian education. Those limitations are:

1. The credit is available only to those parents who satisfy the state's compulsory attendance law. The parent may satisfy the law by sending his child to a nonpublic school taught by teachers whose qualifications are essentially equivalent to public school teachers and where essentially equivalent secular subjects are taught. Minn. Stat. § 120.10, Subd. 2.

Thus even in religiously-affiliated schools, the basic secular subjects must be taught by teachers whose qualifications are essentially equivalent to the public school teachers.

2. In determining the parental costs of education to arrive at the "Amount Paid Limitation", the purchase of religious

textbooks is *excluded*. Only the purchase of those textbooks for "those subjects legally and commonly taught in public elementary and secondary schools in this state . . ." may be included within parental costs. Minn. Stat. § 290.086, Subd. 2. (A. 134)

3. In determining the amount of the credit, the most significant limitation is that contained in the "restricted maintenance cost" formula.

The nonpublic schools must determine their yearly "maintenance costs" which are basically their costs of operation, such as salaries and fixed expenses. These costs are determined in exactly the same manner as the public schools. Minn. Stat. § 290.086, Subd. 1. (A. 134) After determining this gross figure, the nonpublic schools *subtract* income from various sources (federal programs, transportation, sale of lunches, etc.) to arrive at an "adjusted maintenance cost" figure that is likewise equivalent to the public school system.

The adjusted figure is then *reduced* by 20 percent to arrive at the "restricted maintenance cost" for the nonpublic school. Minn. Stat. § 290.086, Subd. 1. (A. 134) The trial court found that this formula embodies the legislative determination that at least 80 percent of the costs of education in nonpublic schools can be attributed to secular aspects of education, while no more than 20 percent can be attributed to sectarian costs of education. (Findings of Fact 41 and 42, A. 77)

This limitation is crucial to the act because in no event can the parental credit exceed 80 percent of the actual current cost in each nonpublic school of educating a child. The restricted maintenance cost is then mutliplied by the state foundation aid percentage, which is the average percentage in state assistance paid to the *public* schools for the school year in which the credit is claimed. Minn. Stat. § 124.212. The purpose of this

last computation is to make the benefit which the nonpublic school parent receives under this act *proportional* to the benefit given to parents (and taxpayers) from state aid policies whereby the state pays part of the maintenance cost of the public schools. (Finding of Fact 29, A. 76)

When these statutory limitations are considered together, and then the formula is applied whereby the parent claims the *lesser* of the Amount Paid Limitation, the Dollar Amount Limitation or the Actual Expense Limitation, the end result is a tax credit both statistically *and* factually supportable as pertaining only to secular education.

B. The Challenges.

The statute was first challenged by the Minnesota Civil Liberties Union, Americans United for the Separation of Church and State, together with individual taxpayers, (A. 1-23), and later by the Minnesota Coordinating Committee for Public Education, together with various public school associations and individual taxpayers. (A. 23-46)

The plaintiffs asserted invalidity of the statute premised on the First Amendment to the United States Constitution and various provisions of the Minnesota Constitution. After appropriate motions, Answers were submitted by the State of Minnesota (A. 47-53) and the two groups of Intervenor Defendants (A. 53-65 and 65-70). The two actions were then consolidated for trial on the merits.

The eight-day trial centered on three basic theories asserted by plaintiffs:

1. that a typical "profile" of a Minnesota nonpublic school could only lead to the conclusion that sectarian teachings so permeated secular teachings that the two were inseparable, thus factually undermining the separation of secular and sectarian embodied in the statute; and

2. that the statute caused divisiveness in the community along denominational lines; and

3. that the statute has generated "entangling relationships" between the state and various church groups and denominational schools.

By one or more of these assertions, plaintiffs hoped to invalidate the act under the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, reh. den. 404 U.S. 876 (1971):

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243, [88 S. Ct. 1923, 1926, 20 L. Ed. 2d 1060, 1065] (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' Walz, supra, . . . 403 U.S. at 612, 613.

C. The Decisions Below.

1. The Trial Court.

The trial court held that the statute did *not* violate the First Amendment nor any provision of the Minnesota Constitution and entered negative findings on the three core factual assertions raised by the plaintiffs.

a. Regarding the "permeation" theory, the Court found that the plaintiffs failed to prove any inclination of religious beliefs into the teachings of secular subjects in nonpublic schools; that they failed to show by cost analysis or *by any measurement* that the 80 percent-20 percent relationship between secular and sectarian education in any nonpublic school was incorrect; and hence that the "restricted maintenance cost" formula of 80 percent-20 percent was reasonable both

on its face *and* as applied. (Findings of Fact 53-56, 84, 87, A. 79, 82) [1]

b. Regarding the divisiveness theory, the Court found that the statute did not cause disharmony along religious lines, and in fact that persons and groups of all faiths both supported and opposed the bill; there was vigorous support and opposition to the bill, but not along denominational lines. (Findings of Fact 89-91, 94-97, A. 83) In addition, the Court found that the self-adjusting portions of the act would preclude any proponents from returning to the Legislature for larger benefits. (Finding of Fact 99, A. 84)

c. Regarding the entangling relationship theory, the Court found that the act created no new or different church-state relationships than other taxing statutes, (Findings of Fact 102-103, A. 84), and hence that no impermissible relationship was created. Central to this conclusion also was that the state's surveillance powers would only consist of examining the cost, receipt, or maintenance figures to verify the deductions claimed by the taxpayers and there would be no surveillance as to what was secular and what was sectarian in the classroom itself. (Findings of Fact 108-111, A. 85)

Based upon these and other factual conclusions, the trial court held that the statute satisfied the tripartite test set forth in *Lemon v. Kurtzman, supra,* and *Tilton v. Richardson,* 403 U.S. 672, 91 S. Ct. 2091 (1971). The secular purpose test was satisfied in that an examination of the statute showed the purpose to be secular, namely, to provide partial tax relief to

[1] Relating to the "permeation" theory, the Court noted a failure by plaintiffs to introduce *any* evidence on nonpublic schools affiliated with religions other than Roman Catholic (Finding of Fact 118, A. 86), and noted further that there were 25 nonpublic schools in the state that had no religious affiliation whatsoever. (Finding of Fact 119, A. 87)

parents of nonpublic school children who, at their own expense, were providing a secular education and thus relieving the state of its obligation to educate all children. (Finding of Fact 7, A. 72)

The Court also held that the primary effect of the statute was secular rather than sectarian, noting the failure of plaintiffs to prove the "permeation theory" and noting further that in *Lemon v. Kurtzman, supra,* the United States Supreme Court did *not* invalidate the Pennsylvania and Rhode Island statutes on the "primary effects" aspect of the test, even though the financial assistance went directly to the nonpublic schools.

Lastly, the Court held, based on the facts, that the statute neither created nor fostered any excessive entanglement between church and state. (Finding of Fact 113, A. 86)

2. The Decision of the Minnesota Supreme Court.

The trial court's decision was rendered on July 6, 1972. Numerous delays occurred in perfecting the appeal before the Minnesota Supreme Court, securing a transcript and preparing briefs. The case was finally argued before the Minnesota Supreme Court on April 1, 1974[2] and a decision filed on November 26, 1974, cited as *Minnesota Civil Liberties Union, v. State of Minnesota,* —— Minn. ——, 224 N.W. 2d 344 (1974).

In the interim between the trial court's decision and the argument before the Minnesota Supreme Court, the United States Supreme Court decided four related opinions: *Committee for Public Education v. Nyquist, supra; Sloan v.*

[2] The Court consisted of seven justices, five regular members and two retired members. The remaining four regular members of the Court, including Chief Justice Robert Sheran, abstained from participation.

Lemon, 413 U.S. 825, 93 S. Ct. 2982; *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472, 93 S. Ct. 2814; and *Hunt v. McNair*, 413 U.S. 734, 93 S. Ct. 2868. These cases were all filed on June 25, 1973.

In its opinion of November 26, 1974, the Minnesota Supreme Court placed this case in a most unique posture: the Court in effect *affirmed* the conclusions of the trial court based on the law applicable at the time of the lower court decision but *reversed* the decision of the trial court on the theory that *Committee for Public Education v. Nyquist, supra*, and its companion cases changed the standards to be applied in church-state First Amendment cases.

The Court interpreted *Nyquist* as holding that there no longer existed a "primary effects" test. (A. 126) If *any* effect of a statute, no matter how remote or indirect, was to aid or assist sectarian institutions, the statute would be invalid under the Establishment Clause. As an integral part of this reasoning, the Court further concluded that the abandonment of the "primary effects" test for an "any effects" test heralded a clear preference for the Establishment Clause over the Freedom of Exercise Clause of the First Amendment. (A. 127)

The Court found it unnecessary to even discuss the "secular purpose" or "entanglement" aspects of the test due to the dispositive nature of its interpretation of *Nyquist* as establishing an "any effects" test. (A. 127)

And in applying what it concluded were the new standards in church-state cases, the Minnesota Supreme Court relied *exclusively* upon the First Amendment; no provision of the Minnesota Constitution was used as a touchstone for its decision. (A. 127)

REASONS FOR GRANTING THE WRIT

The Writ should issue for the following substantial reasons.

A. THE MINNESOTA SUPREME COURT HAS DECIDED FEDERAL QUESTIONS OF SUBSTANCE NOT IN ACCORD WITH PREVIOUS DECISIONS OF THIS COURT.

1. The Establishment Clause.

The Minnesota Supreme Court left no doubt in anyone's mind that *Nyquist* and its companion cases constituted a dramatic change in the standard governing First Amendment cases:

> The trial court found that the statute had a valid secular purpose. We are in accord with that holding. The trial court also found that the statute survived entanglement challenges. A great deal of the trial court's lengthy and learned memorandum dealt with the disposition of the entanglement question. Finally, the trial court found that the primary effect of the statute was not to promote the establishment of religion. *Absent subsequent decision of the Supreme Court, such a finding was fully justified* under the standards established by the Supreme Court in Tilton v. Richardson, *supra.*
>
> *However, during the pendency of this appeal, a series of decisions was announced by the Supreme Court of the United States which effectively changed the course and standard of measurement of establishment questions.*
>
> —— Minn. at ——; 224 N.W. 2d at 349, 350; A. 118-119. (Emphasis supplied.)

After discussion of the June, 1973 cases, the Minnesota Supreme Court articulated *how* the standard was changed:

> In applying the "primary effects test," we must be guided by the realization, as indicated above, that this is no longer a primary effects test, but an "any effects" test. Under such a standard, the legislation in question cannot pass constitutional muster.
>
> —— Minn. at ——; 224 N.W. 2d at 353; A. 126.

The obvious conclusion reached by the Court was that *any* indirect or remote assistance to a church or sectarian institution will render a statute invalid.

Petitioners do not reach such a conclusion from *Nyquist;* on the contrary, the majority opinion clearly analyzed the New York statutes in light of the "primary effects" test. The Court not only recited the standard expression of the test (413 U.S. 773, 93 S. Ct. 2965), but in discussing prior decisions, stated:

> These cases simply recognize that sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian.
>
> * * *
>
> *But an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law.*
>
> 413 U.S. at 775; 93 S. Ct. at 2967. (Emphasis supplied.)

By treading this narrow path, the majority in *Nyquist* left intact the prior decisions of the Court where obviously some form of indirect assistance could flow to the religious school or institution. Thus *Nyquist* did not undermine such precedents as *Everson v. Board of Education,* 330 U.S. 1, 67 S. Ct. 504 (1947); *Board of Education v. Allen,* 392 U.S. 236, 88 S. Ct. 1923 (1968); *Walz v. Tax Commission,* 397 U.S. 664,

90 S. Ct. 1409 (1970), or *Tilton v. Richardson, supra,* which all involved indirect (but often substantial) monetary benefits. (Of course, *Hunt v. McNair, supra,* was decided the same day as *Nyquist.*) And neither did the case destroy prior law dealing with indirect sectarian benefits of other than a monetary nature, such as *McCollum v. Board of Education,* 333 U.S. 203, 68 S. Ct. 461 (1948); *Zorach v. Clauson,* 343 U.S. 306, 72 S. Ct. 679 (1952); or *McGowan v. Maryland,* 366 U.S. 420, 31 S. Ct. 1101 (1961).

Yet the Minnesota Supreme Court has interpreted *Nyquist* as holding that a statute will be declared void if *any effect* is to further sectarian purposes, and hence, for all practical purposes, these prior cases are to be disregarded. This inevitable conclusion was recognized in the concurring opinion of Justice Yetka of the Minnesota Supreme Court:

> If this recent trend of decisions by the United States Supreme Court continues to its logical conclusion, the decision of Walz v. Tax Commission, 397 U.S. 664, 90 S. Ct. 1409, 25 L.Ed. 2d 697 (1970), appears in jeopardy.
>
> —— Minn. ——, 224 N.W. 2d at 354, A. 129-130.

Justice Yetka could have added the cases cited above due to the consistency of their results.

By its interpretation of *Nyquist,* the Minnesota Supreme Court also placed in confusion any meaningful interpretation of the other 1971 decisions, namely, *Lemon v. Kurtzman, supra,* and *Earley v. DiCenso,* 403 U.S. 602, 91 S. Ct. 2105 (1971). These cases invalidated Pennsylvania and Rhode Island statutes, respectively, which gave various types of direct subsidies to sectarian schools. The statutes were *not* voided on the secular purpose or "primary effects" aspects of the test, however, but on the entanglement issue. If the Minnesota Supreme Court is correct, the entanglement issue is

moot because statutes of that type must necessarily be voided under an "any effects" test. Again, Petitioners do not read *Nyquist* so severely; the entanglement issue should still be relevant because the controlling test from this Court is the "primary effects" test.

2. The Free Exercise Clause.

As a necessary corollary to its reading of the Establishment Clause, the Minnesota Supreme Court upset the delicate balance this Court has been attempting to establish between the religion clauses of the First Amendment.

> The majority opinion in Nyquist disregarding the balancing approach of Walz and related cases has *chartered a new course, giving clear preference to the Establishment Clause over the Freedom of Exercise Clause of the First Amendment.*
>
> —— Minn. at ——, 224 N.W. 2d at 353, A. 127. (Emphasis supplied.)

Such language is in stark contrast to repeated expressions of neutrality by Chief Justice Burger in *Walz v. Tax Commission, supra:*

> The Court has struggled to find a neutral course between the two religion clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.
>
> 397 U.S. at 668-669, 90 S. Ct. at 1411.
>
> * * *
>
> Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.
>
> 397 U.S. at 669-670; 90 S. Ct. at 1402.

Such a conclusion by the Minnesota Court also has grave overtones regarding established precedent such as *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571 (1925), and more recent law such as *Wisconsin v. Yodor*, 406 U.S. 205, 92 S. Ct. 1526 (1972).

Thus the entire parameters of the two religion clauses are here brought in to play.

3. Had the Minnesota Supreme Court Correctly Interpreted Nyquist and Its Companion Cases, the Lower Court Would Have Been Affirmed.

Petitioners' position at the time of trial was that this statute was in accord with the then latest expressions in this area, *Lemon v. Kurtzman, supra,* and *Tilton v. Richardson, supra.* The June, 1973 decisions did nothing to change that position. Instead, the emphasis simply shifted to sustaining the statute both under prior law and *Nyquist* and companion cases, which Petitioners assert they did in brief and oral argument before the Minnesota Supreme Court. In order to convince this Court to grant the Writ, however, some brief comments on why this statute was valid under *Nyquist* appear to be in order.

a. *Nyquist* and companion cases came before this Court on procedural motions without the benefit of documented trial records. This posture allowed this Court to *assume* the religious nature of the nonpublic school, hence giving immediate credence to the "permeation" theory. Thus in *Nyquist, supra,* the Court stated:

> No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes *nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions* . . . .
>
> 413 U.S. at 774; 93 S. Ct. at 2966. (Emphasis supplied.)

This is more clearly explained in *Hunt v. McNair, supra,* decided the same day:

> Aid normally may be thought to have a primary effect of advancing religion *when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.*
>
> 413 U.S. at 743; 93 S. Ct. at 2874. (Emphasis supplied.)

Here the eight-day trial, the 100-odd exhibits and the findings and conclusions of the trial court resulting therefrom, do *not* support these generalizations. Plaintiffs were forced to prove the validity of the permeation theory and hence overcome the statistical guarantees of neutrality in the statute. Plaintiffs failed in their burden of proof; the evidence failed to establish any permeation of the sectarian into the secular in the schools examined. This resulted in the negative findings referenced before.

b. The statute is so constructed that the amount of tax credit can *never* exceed 80 percent of the actual expenses per pupil in the nonpublic school. Thus even if the tuition paid by the parent or the dollar limitation are greatly in excess of the actual expense limitation, the 80 percent limitation will control; the amount of the credit is always the *lesser* of the three computations. The 80 percent-20 percent formula embodies the legislative conclusion that at least 80 percent of actual maintenance costs in nonpublic schools relate to secular activities. (Findings of Fact 41 and 42, A. 77) And the credit can never exceed this amount.

In *Nyquist,* the three statutes had obvious defects that did not separate secular from sectarian. The maintenance and repair grants contained only a dollar limitation. The parental

grants were *unrestricted* grants of $50 and $100 limited only to not exceed one-half of actual tuition. The "tax modification" or deduction act was based on a sliding scale that depended solely on the amount of taxable income. Thus in all three acts there was no real attempt to separate secular and sectarian activities in the nonpublic schools, proportion the costs accordingly and then provide parental assistance based upon the costs of the secular education shouldered by those parents. Thus the acts were voided because of both the statistical and actual possibility that some of the public funds would be used to support sectarian activities.

Under the Minnesota law, however, the statute was carefully drafted to separate costs relating to secular and sectarian activities, and the trial *on the merits* demonstrated that such a result was statistically and practicably achievable.

c. The distinction between *Nyquist* and this case goes further, however. The grants in *Nyquist* were totally unrelated to the educational counterpart, namely the *public* school system. Here the gross maintenance costs of the nonpublic school are determined according to the exact same standards as the public schools. After that gross figure is reduced by 20 percent to arrive at the "restricted maintenance cost" per pupil unit, the result is multiplied by the average state foundation aid percentage in the *public* school system. In other words, the credit is not only restricted to the maximum secular costs of education, but the credit is proportional to the assistance that the state renders to the parents of public school students in the form of state foundation aids.[3]

---

[3] For example, if the maintenance cost per pupil unit in a nonpublic school was $400, restricted maintenance cost is $320, and if the ratio of state aids was 35 percent, the credit would be $112 per pupil.

This concept is significant for two reasons:

(1) it recognizes that the nonpublic school parent is providing a secular education for his child in all respects comparable to the free education provided in the public schools; and

(2) it maintains a cost ratio between the two school systems so that the nonpublic school costs do not "run away" from the public school costs.[4]

This aspect of the formula further guarantees that the parental assistance is related only to the secular aspects of education provided by them.

There are other distinctions between *Nyquist* and this case, but Petitioners assert enough has been said to demonstrate that if the Minnesota Supreme Court had not misinterpreted *Nyquist*, an affirmance would have resulted.

B. GREAT UNCERTAINTY IS PRESENT IN POST-NYQUIST DECISIONS SO THAT THIS COURT'S POWER OF SUPERVISION SHOULD BE EXERCISED.

Even though *Nyquist* and companion cases were just decided in June, 1973, the case law demonstrates great uncertainty both as to the applicable standard in church-state cases, and the application of the standard to concrete facts. The following cases demonstrate this assertion.

In *State ex rel. Warren v. Nusbaum*, 64 Wis. 2d 314, 219 N.W. 2d 577 (1974), the Wisconsin Supreme Court upheld direct grants of public funds to public and nonpublic schools in order to educate handicapped children. Despite the fact that

[4] In fact, the reverse seems to be true. The trial disclosed that the maintenance costs per pupil unit in the nonpublic school system were substantially *lower* than in the public school system. (Finding of Fact 66, A. 80)

the schools involved were elementary and secondary, the Court made only footnote references to *Nyquist*, justifying its decision on *Hunt v. McNair, supra*, and *Tilton v. Richardson, supra*. The Court stated the test in terms of the "primary effect" of the statute, rather than "any effect." On a set of *stipulated facts*, the Court then separated the secular from the sectarian nature of the instruction to be provided:

> While the educators and staff involved in such laudable endeavor as the providing of special educational services may generally be of a singular religious denomination such is insufficient to characterize their conscious or subconscious attitudes as necessarily religiously directed. We do not question the religious background of our legislators, executive officers or members of our judiciary in furtherance of their respective duties and neither may bad faith be presumed on the part of professionals involved in special educational services.
>
> 64 Wis. 2d at 325, 219 N.W. 2d at 583.

In *Allen v. Morton*, 495 F. 2d 65 (1973), the Circuit Court for the District of Columbia decided that the Christmas Pageant for Peace held on federal land adjacent to the White House was constitutionally permissible if the regulations were amended to avoid excessive entanglement of federal officials. In discussing the "primary effect" test, the Court states:

> . . . the degree of religiosity permeating the activity with which it is involved can have a direct bearing on what controls it must establish.
>
> * * *
>
> . . . we are involved in a balancing test, considering variables such as the degree of sectarianism in the institution or event with which the government is involved, the extent of the government's involvement, and the controls placed thereon.
>
> 495 F. 2d at 72.

In a footnote to the last cited sentence, the Court then delves into a semantic jungle in attempting to apply its elusive standard:

> The Pageant, as previously discussed, is not subsumed in a religious mission, but it cannot be ignored that the religious symbol contained in the Pageant can have a religious effect, and the degree of this effect can vary according to how it is utilized. In turn, the effect of the Government's involvement therewith can vary according to the restrictions and controls placed thereon. A balancing of all of these factors determines if the effect of the Government's involvement is more than remotely or incidentally beneficial to religious institutions.
>
> The creche as used in the Pageant is not supposed to have a sectarian effect in the sense of advancing any religious belief. The reality of the situation—considering its status as a Christian religious symbol—leaves open for debate whether its use is susceptible to misinterpretation, and the Government's involvement looked upon as an imprimatur of the belief that it symbolizes.
>
> Ibid.

Probably the best expression of the uncertainty generated by *Nyquist* is found in the concurring opinion of Justice Yetka of the Minnesota Supreme Court in this case.

> Although the majority decision of this court is mandated by the recent opinions of the United states Supreme Court which apparently forbid any direct aid to nonpublic schools, I am compelled to state that there appears to be a sharp departure from past precedent.
>
> It is difficult to perceive the distinction between striking down a tax credit allowed for sending a child to a nonpublic school when that school must follow a state

prescribed curriculum and where no part of the tax credit may be used for the teaching of religion oriented subjects, and yet, on the other hand, upholding the constitutionality of granting tax-exempt status to churches, and further, to allow an individual a tax deduction for contributions to his church. This case points out once again that while a strong philosophical argument could be made against all tax exemptions or deductions, this is a province that is better left to legislative determination, not to the courts.

I do not fear that the legislation at issue in the instant case would somehow foster the establishment of any religion. There is a distinction between actively supporting a religion or religions, and offering private education the chance to exist and to be available to all parents—poor or middle class, as well as the wealthy—who choose to exercise the right to send their children to nonpublic schools.

The strict scrutiny that legislations, such as that struck down today, must undergo appears far beyond the degree of protection necessary to insure that our nation will be free from a "state religion" or religious persecution of its citizens. Rather, our legislature appears now to be barred from making any reasonable effort to insure that nonpublic education will survive except for the very wealthy. However, the highest court in our land has spoken, and this court and our legislature must adhere to its word.

—— Minn. at ——, 224 N.W. 2d at 354, 355; A. 129-130.

CONCLUSION

This case offers an excellent factual vehicle for this Court to correct the uncertainty generated by *Nyquist*, the error of the Minnesota Supreme Court in its position that the "primary effects" test is replaced by an "any effects" test, and the error that the Establishment Clause overshadows the Free Exercise Clause of the First Amendment.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
Petition for Writ of Certiorari	3
Opinions Below	3
Jurisdiction	4
Questions Presented	4
Constitutional Provision and Statute Involved	5
Statement of the Case	5
Reasons for Granting the Writ:	
I. Decision below is in conflict with Decisions of this Court	7
II. Decision below deprives petitioners of their First Amendment rights	8
III. Subordination of the Free Exercise Clause to the Establishment Clause requires correction	13
Conclusion	14
Addendum	Add-1

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

(A single appendix is separately printed and submitted on behalf of the several petitioners)

Pleadings	A-1
Findings and Opinions of the Trial Court	A-71
Opinion of the Minnesota Supreme Court	A-107
Petition for Rehearing	A-131
Order denying Rehearing	A-132
Judgment of Minnesota Supreme Court	A-133
The Statute in controversy	A-134

TABLE OF AUTHORITIES

Cases:

Board of Education v. Allen, 392 U.S. 236 (1968) .. 12
Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) 4, 7, 8, 12
Everson v. Board of Education, 330 U.S. 1 (1947) .. 12
Hunt v. McNair, 413 U.S. 734 (1973) 7
Lemon v. Kurtzman, 403 U.S. 602 (1971) 7
Norwood v. Harrison, 413 U.S. 455 (1973) 8, 12
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 13
Sherbert v. Verner, 374 U.S. 398 (1963) 13
Tilton v. Richardson, 403 U.S. 672 (1971) 7, 13
Walz v. Tax Commission, 397 U.S. 664 (1970) 4, 13
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 13
Wisconsin v. Yoder, 406 U.S. 205 (1972) 13

United States Constitution:

Amendment 1 .....4, 5

Statutes:

28 U.S.C. Section 1257(3) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. ———

STATE OF MINNESOTA,

ARTHUR C. ROEMER, Commissioner of Taxation, Income Tax Division, Department of Taxation, State of Minnesota,

GEROME T. CAULFIELD Coordinator, Income Tax Division, Department of Taxation, State of Minnesota,

VAL BJORNSON, Treasurer, State of Minnesota,

ROLLAND F. HATFIELD, Auditor, State of Minnesota,

HOWARD B. CASMEY, Commissioner of Education, State of Minnesota,

RICHARD L. BYE, DAVID C. BRANDON, DANIEL BURTON, B. ROBERT LEWIS, RALPH H. PETERSON MARY JO RICHARDSON, GEORGE A. ROSSMAN, HENRY E. SCHROEDER AND LOUIS R. SMERLING, as members of the State Board of Education, State of Minnesota,

SAMUEL L. RICHARDSON, Commissioner, Department of Human Rights, State of Minnesota,

Petitioners,

and

LOUIS QUAST, RICHARD G. CONLIN, JOSEPH L. LEWIS AND MANUEL RIVERA, INTERVENORS,

Petitioners,

and

JAMES P. LARKIN, HARRIS DUININCK, BERT VAN'T HULL, ALBERT F. MARTIN, ROBERT GEORGE ZABEL, AND ROBERT ULRICH, INTERVENORS,

Petitioners,

vs.

MINNESOTA CIVIL LIBERTIES UNION,

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,

MATTHEW STARK, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

DONALD E. KRAUSE, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

KATHLEEN E. HAUSER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

ROLFE E. HAUSER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

CARL LUNDSTROM, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

ELEANOR OTTERNESS, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

WILLIAM B. OTTERNESS, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

Respondents

and

MINNESOTA COORDINATING COMMITTEE FOR PUBLIC EDUCATION;

SCHOOL ADMINISTRATORS OF MINNESOTA;

MINNESOTA EDUCATION ASSOCIATION;

MINNESOTA FEDERATION OF TEACHERS;

MINNESOTA ASSOCIATION OF SCHOOL ADMINISTRATORS;

MINNESOTA ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS;

MINNESOTA ELEMENTARY SCHOOL PRINCIPALS ASSOCIATION;

MINNESOTA CONGRESS OF PARENT AND TEACHERS ASSOCIATIONS;

AMERICAN JEWISH CONGRESS;

JEWISH COMMUNITY RELATIONS COUNCIL OF MINNESOTA;

FIRST UNITARIAN SOCIETY OF MINNEAPOLIS;

MINNESOTA CONFERENCE OF SEVENTH DAY ADVENTISTS;

BRUCE A. OLANDER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

VALERIE V. OLANDER, by BRUCE A. OLANDER, as her Guardian ad Litem;

MRS. JANET M. SIGFORD, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

EDWARD HENKEN, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

FRANKLIN G. EMRICK, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

TOLLIE J. FLIPPIN, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

MRS. ROBERT ROSE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

EDWARD BOLSTAD, individually and as a representative of the class of all taxpayers of the State of Minnesota;

A. L. GALLOP, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

JAMES J. ROSASCO, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

DAVID W. MEADE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

MRS. ARVIS NELSON, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

L. E. WERMAGER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

CHARLOTTE CARMAUCHE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

MARY VAN KIRK, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

WAYNE VAN KIRK, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

CALVIN DIDIER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

SAMUEL L. SCHEINER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

OPINIONS BELOW

The opinion of the Minnesota District Court (A. 89)* is not reported. The opinion of the Supreme Court of Minnesota (A. 107) is reported at 224 N.W.2d 344 (1974).

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*Throughout this petition "A." indicates the appropriate page of the Joint Appendix agreed to by all parties.

JURISDICTION

The decision of the Minnesota Supreme Court was rendered November 26, 1974 (A. 107). Petitioners' timely petition for rehearing was denied by order entered December 26, 1974 (A. 132). The judgment of the Minnesota Supreme Court was entered December 27, 1974 (A. 133). Jurisdiction of this Court is invoked under 28 *U.S.C.* § 1257(3).

QUESTIONS PRESENTED

1. Has this Court's First Amendment test of the requisite secularity of effect of a State statute (the statute is constitutional if its principal or primary effect is one that neither advances nor inhibits religion) been wrongly replaced by the new Minnesota test (the statute is unconstitutional if it has "any effects" that advance religion, regardless of the test's consequences for free exercise of religion).

2. Did this Court in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), and related cases also decided on June 25, 1973, require the abandonment of the balancing analysis of *Walz v. Tax Commission*, 397 U.S. 664 (1970) and comparable holdings, in order to give the First Amendment's Establishment Clause preferment and priority over its Free Exercise Clause?

3. Did the Minnesota Court's use of the "any effects" test in passing upon the requisite secularity of the statute, rather than this Court's "primary effect" test, effectively deprive petitioners of their right of free exercise of religion?

4. May the Free Exercise Clause be absolutely subordinated to the Establishment Clause without violating the freedom of religion guaranteed by the First Amendment?

5. Does the Minnesota Nonpublic School Tax Credit Act, by providing income tax credits to parents of nonpublic school children which in no event may exceed the actual cost of secular education of such children, violate the First Amendment because it applies to religiously affiliated as well as other nonpublic schools?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"

The statute involved, *Minn. Stat.* 290.086-290.087 (*Minn. Laws* 1971, c. 944) is printed in the Appendix (A. 134).

STATEMENT OF THE CASE

The Minnesota statute which is the subject of this litigation provides a tax credit for parents with children in nonpublic schools (A. 134). The complaint alleges that the subject statute is violative of the First Amendment to the Constitution of the United States (Complaint, Paragraph 35 (e) & (f) (A. 19)).

The matter came on for trial in the State District Court on March 1, 1972 (A. 71). After a lengthy and exhaustive trial, the District Court made 126 separate Findings of Fact (A. 71). The District Court in its Conclusions of Law determined the statute constitutional (A. 88). It found the statute had a secular legislative purpose, i.e. to provide partial tax relief to parents and legal guardians of nonpublic school children who, at their own expense, are providing a secular education for their children, thus relieving

the state of an obligation it would otherwise be fully obligated to perform (Finding 7, A. 72).

The District Court found that the statute's principal or primary effect was one that neither advanced nor inhibited religion (Findings 39, 40, 41, 42, 52, 54, 55, 56, A. 77). It found that the etatute did not foster excessive governmental entanglement with religion (Findings 95, 96, 97, A. 83). None of these findings has ever been seriously challenged.

On appeal the Minnesota Supreme Court reversed holding the statute unconstitutional on the sole ground that the statute had *some effect* of advancing religion (224 N.W. 2d 344; A. 126). It purported to set forth this Court's present position respecting the requisite secularity of effect of a State statute as follows: "In applying the 'primary effects test,' we must be guided by the realization . . . that this is no longer a primary effects test, but an 'any effects test' " (224 N.W.2d at 353; A. 126). It rested its holding on the ground that clear preference must now be given to the Establishment Clause over the Free Exercise Clause of the First Amendment (224 N.W.2d 353; A. 127).

The Minnesota Supreme Court did not undermine in any way the District Court's Findings of Fact, but rather either expressly approved them or assumed them correct (224 N.W.2d at 349, 353; A. 119).

An illustrative example of the mechanics of the subject statute is included in an addendum at the end of this petition.

This lawsuit was litigated from its beginning through the Minnesota Supreme Court as a First Amendment case. The complaint alleged First Amendment violations (A. 19), the District Court found none (A. 88), and the Minnesota

Supreme Court, by reason of its interpretation of *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), held the Minnesota statute unconstitutional (A. 126).

REASONS FOR GRANTING THE WRIT

I.

The Decision of the Minnesota Supreme Court on First Amendment Questions of Substance is in Conflict with Decisions of this Court.

The decision of the Minnesota Court is radically discordant with this Court's First Amendment test as to the requisite secularity of effect of a State statute. This Court has established that it is enough to satisfy the Establishment Clause that the statute's "principal or primary effect must be one that neither advances nor inhibits religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Tilton v. Richardson*, 403 U.S. 672, 679 (1971); *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

The Minnesota Court proceeded on a directly conflicting rationale. "In applying the 'primary effects test,' we must be guided by the realization . . . that this is no longer a primary effects test, but an 'any effects' test." (224 N.W.2d at 353; A. 126). Minnesota's sharp departure from this Court's established test requires correction. Clearly the unwarranted conclusion below was predicated on that departure, for it was undisputed that the statute's legislative purpose was secular (224 N.W.2d at 349; A. 108), and the trial court's finding of no impermissible entanglements (A. 101), and the trial court's finding of no impermissible entanglements (A. 101) was undisturbed by the Minnesota Supreme Court (224 N.W.2d at 353; A. 119).

The error resulting from the Minnesota Court's miscon-

ception of the controlling primary effect test is transparent when its action is measured against *Norwood v. Harrison*, 413 U.S. 455, 468-69 (1973):

> [W]here carefully limited so as to avoid the prohibitions of the "effect" and "entanglement" tests, States may assist church-related schools in performing their secular functions, . . . not only because the States have a substantial interest in the quality of education being provided by private schools, . . . but more importantly because assistance properly confined to the secular functions of sectarian schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others.
>
> . . . [T]he transcendant value of free religious exercise in our constitutional scheme leaves room for "play in the joints" to the extent of cautiously delineated secular governmental assistance to religious schools, despite the fact that such assistance touches on the conflicting values of the Establishment Clause by indirectly benefiting the religious schools and their sponsors.

II.

Nyquist does not Control the Case at Bar, and the Minnesota Supreme Court by its Interpretation to the Contrary Deprived Petitioners of their First Amendment Rights.

The crucial difference between the New York and Minnesota tax credit statutes makes the holding of *Committee for Public Education v. Nyquist*, 413 U.S. 756 5(1973) inapplicable. To perceive this it is necessary to note precisely that according to the Court's summary of the New York statute, its tax credit part was so structured as wholly to ignore any relation between the cost of educating a child in

a nonpublic school and the cost of educating him in the public school. Hence, the tax credit allowed by New York on account of the nonpublic school child bore no relation whatsoever to the cost of public education. The Court summarized the tax relief parts of the New York statute at 413 U.S. 765-67,and referred to them a second time at 413 U.S. 790. Under the New York law parents could subtract from their adjusted gross income for state income tax purposes a designated amount (which varied according to income) for each dependent for whom they paid at least $50.00 in nonpublic school tuition. But the amount of the deduction was not dependent upon how much the taxpayer actually paid for nonpublic school tuition, and bore no relation whatsoever to the cost of educating a public school child.*

The Minnesota Act avoids the New York pitfall. *Minn. Stat.* § 290.086-290.087 (1971) (A. 134). "Education costs" include tuition, classroom instructional fees and textbooks used in teaching those subjects taught in public schools. *Minn. Stat.* 290.086 (2). Textbooks and materials used in teaching religious tenets, doctrines or worship are specifically excluded. *Minn. Stat.* 290.086 (4). While the

*It is essential carefully to differentiate in this regard another part of the New York statute, also involved in *Nyquist* namely the nonpublic school maintenance sections, which did state a relationship between public and nonpublic school costs. As to that part the *Nyquist* opinion points out "The Commissioner is also required to ascertain the average per pupil cost for equivalent maintenance and repair services in the public schools, and in no event may the grant to nonpublic qualifying schools exceed 50% of that figure." 413 U.S. at 763. The maintenance part of the statute was struck down because it was held to have directly subsidized the religious activities of sectarian schools, 413 U.S. at 774, and is not of direct concern here. The important point here is that the New York tax credit provisions provided absolutely for credits without attempting any relationship between public and nonpublic school costs, and therefore without providing any guarantee for limiting benefits to the secular education of the nonpublic school children.

tax credit for nonpublic school education costs may increase from year to year, any increase is automatic—the function of a mere mathematical calculation—and is limited to the same percentage that state aid to public schools is increased. *Minn. Stat.* 290.086 (5). The amount of the tax credit may not exceed the actual cost of sending a child to a nonpublic school. Moreover, there is fixed an absolute limit of tax credit for each and every year, in terms of specific relation to public school costs. Thus, *Minn. Stat.* 290.086 (5), after setting forth the formula for calculating the tax credit, provides:

> However, in no event, shall any tax credit per pupil unit allowed per student under this section, when related to the individual nonpublic school restricted maintenance cost per pupil unit in average daily attendance of the school year completed during the same calendar year for which the tax credit is claimed, exceed the percent of the average state foundation aid per pupil unit in average daily attendance for Minnesota public elementary and secondary schools in relation to the average state and local maintenance cost per pupil unit in average daily attendance in said public schools for the school year completed during the same calendar year for which the tax credit is claimed.

In other words, the ratio of the tax credit to the individual nonpublic school "restrict maintenac cost" per pupil unit cannot exceed the ratio of the average state foundation aid per pupil unit for public schools to the average state and local maintenance cost per pupil unit. As the District Court expressed it in its Finding of Fact No. 27, approved by the Supreme Court (224 N.W.2d at 349; A. 118) the maximum credit cannot exceed.

> [T]he restricted maintenance cost per pupil unit

> in average daily attendance multiplied by the average public school state foundation aid, limited to the number of months the child was enrolled (A. 75).

It is of course clear that the Minnesota provision is very conservative, being limited to a part only of state foundation aid for the public school child. More important legally, however, is the clear fact that the credit results from the specified relationship of public and nonpublic school costs, and is a function of that relationship. Obviously no part of public school costs is for religious purposes. In any world approaching the real, a tax credit on account of an nonpublic school child, limited to a part only of a part (the state foundation aid) of the total public school costs of educating the child, could not exceed the costs of the secular education of the nonpublic school child. This seems beyond contradiction when it is realized that the secular instruction of public and nonpublic schools, in scope, subject matter and coverage, is substantially similar. As the District Court found, "Minnesota has a compulsory attendance statute which requires children between the ages of seven and 17 to attend a public school or a private school, for not less than nine months per year, *Minn. Stat.* 120.10." (Finding No. 44, A. 77). There are also express Findings that a parent is able to satisfy the compulsory attendance law by sending the child to a nonpublic school where secular subjects are taught essentially equivalent to public school subjects and by comparable teachers, *Minn. Stat.* 120.10, Subd. 2; that the standards are enforced by sanctions including criminal ones, *Minn. Stat.* 120.12, and that respondents did not prove or attempt to prove that any nonpublic elementary or secondary school in Minnesota fails to meet compulsory attendance standards (A. 78).

While arguably Minnesota might have used, because of the over-all limitation of its formula, the full 100% of nonpublic school maintenance costs, in any event the use of the lesser figure ["restricted maintenance cost," the figure applicable to public school less 20 percent, *Minn. Stat.* 290.086(1)] (A. 134) was found explicitly to limit the benefit of the tax credit to secular education. On this, Findings of Fact 38-43 are conclusive (A. 77).

Thus the Minnesota statute does not involve, and specifically was found not to involve, the "mere statistical judgment" that *Nyquist* says "will not suffice as a guaranty that state funds will not be used to finance religious education." 413 U.S. at 778. Unlike New York, the Minnesota statute sets forth a specific relationship to the cost of public education that, on its face, assures no impermissible support of religion under this Court's primary effect test. And what the statute means, it was after full trial found to mean, by Findings left undisturbed by the Minnesota Supreme Court. Therefore the Minnesota statute is well within the established doctrine that secular aid to individuals for secular purposes, with a primary secular effect and without impermissible entanglements, is constitutional.

> *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968). See also *Norwood v. Harrison*, 413 U.S. 455, 468-469 (1973).

Nyquist itself recognizes that its holding turns upon the "absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes," 413 U.S. at 780. Minnesota, unlike New York, has precisely provided such an effective means. *Nyquist* does not control this case,

and the Minnesota Supreme Court, on its own factual premises, fell into fatal error in holding that it does.

III.

The Minnesota Supreme Court's Subordination of the Free Exercise Clause to the Establishment Clause Requires Correction.

The First Amendment's promise of religious freedom is a lofty and inspiring ideal.

> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925);
> *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943);
> *Sherbert v. Verner*, 374 U.S. 398 (1963)
> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Admittedly the "internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause," *Tilton v. Richardson*, 403 U.S. 672, 677 (1971); *Norwood v. Harrison*, 413 U.S. 455, 469 (1973), demands difficult and delicate balancing. *Walz v. Tax Commission*, 397 U.S. 664 (1970).

The decision below is believed to be the first time a State Supreme Court has abandoned the required balancing, and, by misconstruction of this Court's teaching, given the Establishment Clause absolute priority over the Free Exercise Clause.

> "The majority opinion in Nyquist disregarding the balancing approach of Walz and related cases has chartered a new course, giving clear preference to the Establishment Clause over the Freedom of Exercise Clause of the First Amendment." (224 N.W.2d at 353; A. 127).

Such false teaching jeopardizes the American ideal of religious freedom, and should be corrected.

CONCLUSION

Wherefore, it is respectfully requested that this petition for a writ of certiorari to the Supreme Court of Minnesota be granted.

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ADDENDUM

Illustrative example: 5 limitations, each more restrictive than previous step. Example for elementary student during 1973 calendar year.

1. The definition of "maintenance cost" is the same for public and non-public schools. "Restricted maintenance cost" is 80% of actual operating, i.e. non-capital expense of nonpublic school, less any cost of religious materials.

Assume: Actual per pupil operating cost exclusive of religious materials is $500.00.

Then: "restricted maintenance cost"=.80 (500.-00) =400.00.

2. Assume State Foundation aid to public schools is 50% of public school operating costs.

Then: maximum credit is 50% of $400.00=$200.-00.

3. Assume 1973 State Aid is $550.00 per year. Assume 1972 State Aid was $500.00 per year.

Then: maximum credit is (550/500) (100.00)= $110.00.

4. Assume child in school only for September, October, November and December.

Then: maximum credit is (4 months) (10 % per month) (110.00)=$44.00.

5. Assume actual expenditure by parent is $30.00.

Then: maximum credit is $30.00.

Thus, in the above example the maximum credit is $30.-00.

MAR 17 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1168

~~STATE OF MINNESOTA, ET AL.,~~
~~Petitioners,~~

~~and~~

LOUIS QUAST, ET AL.,
~~Intervenors~~,
Petitioners,

~~and~~

~~JAMES P. LARKIN, ET AL.~~,
~~Intervenors~~,
~~Petitioners~~,

vs.

MINNESOTA CIVIL LIBERTIES UNION, ET AL.,
Respondents,

and

MINNESOTA COORDINATING COMMITTEE FOR PUBLIC EDUCATION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR WRIT OF CERTIORARI

By Intervenor-Petitioners, Louis Quast, Richard G. Conlin, Joseph L. Lewis and Manuel Rivera

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TABLE OF CONTENTS

	PAGE
Petition for Writ of Certiorari	4
Opinions Below	5
Jurisdiction	5
Statute Involved	6
Questions Presented	6
Applicable Constitutional Provisions	7
Statement of the Case	7
1. The Statute Involved	7
2. The Proceedings Below	9
The Questions Are Substantial	13
1. Establishment Clause Questions	13
3. Free Exercise Clause Questions	15
3. Equal Protection Clause Questions	16
Reasons for Granting Writ	17
Conclusion	18
Appendix to Petition for Writ of Certiorari	
(A single appendix is separately printed and submitted on behalf of the several petitioners.)	

TABLE OF AUTHORITIES

PAGE

Cases:

Board of Education v. Allen, 392 U.S. 236 (1968) 15

Committee for Public Education v. Nyquist, 413 U.S. 765 (1973) 9, 10, 11, 13, 15, 17

Earley v. DiCenso, 403 U.S. 602 (1971) 10

Everson v. Board of Education, 330 U.S. 1 (1947) 16

Hunt v. McNair, 413 U.S. 734 (1973) 11

Lemon v. Kurtzman, 403 U.S. 602 (1971) 10

Levitt v. Committee for Public Education, 413 U.S. 472 (1973) 11

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 15, 16

Sloan v. Lemon, 413 U.S. 825 (1973) 11

Tilton v. Richardson, 403 U.S. 672 (1971) 10

Walz v. Tax Commission, 397 U.S. 664 (1970) 10, 14

Wisconsin v. Yoder, 406 U.S. 205 (1972) 16

United States Constitution:

Amendment 1 ..... 6, 7, 9, 13, 18

Amendment 14 ..... 7, 13, 16

Statutes:

28 U.S.C. Section 1257(3) 5

IN THE

Supreme Court of the United States

October Term, 1974

No. ———

STATE OF MINNESOTA,
ARTHUR C. ROEMER, Commissioner of Taxation, Income Tax Division, Department of Taxation, State of Minnesota,
GEROME T. CAULFIELD, Coordinator, Income Tax Division, Department of Taxation, State of Minnesota,
VAL BJORNSON, Treasurer, State of Minnesota,
ROLLAND F. HATFIELD, Auditor, State of Minnesota,
HOWARD B. CASMEY, Commissioner of Education, State of Minnesota,
RICHARD L. BYE, DAVID C. BRANDON, DANIEL BURTON, B. ROBERT LEWIS, RALPH H. PETERSON, MARY JO RICHARDSON, GEORGE A. ROSSMAN, HENRY E. SCHROEDER AND LOUIS R. SMERLING, as members of the State Board of Education, State of Minnesota,
SAMUEL L. RICHARDSON, Commissioner, Department of Human Rights, State of Minnesota,

Petitioners,

and

LOUIS QUAST, RICHARD G. CONLIN, JOSEPH L. LEWIS AND MANUEL RIVERA, INTERVENORS,

Petitioners,

and

JAMES P. LARKIN, HARRIS DUININCK, BERT VAN'T HULL, ALBERT F. MARTIN, ROBERT GEORGE ZABEL, AND ROBERT ULICH, INTERVENORS,

Petitioners,

vs.

MINNESOTA CIVIL LIBERTIES UNION,
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,
MATTHEW STARK, individually, and as a representative of the class of all taxpayers of the State of Minnesota,
DONALD E. KRAUSE, individually, and as a representative of the class of all taxpayers of the State of Minnesota,
KATHLEEN E. HAUSER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,
ROLFE E. HAUSER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,
CARL LUNDSTROM, individually, and as a representative of the class of all taxpayers of the State of Minnesota,
ELEANOR OTTERNESS, individually, and as a representative of the class of all taxpayers of the State of Minnesota,
WILLIAM B. OTTERNESS, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

Respondents,

and

MINNESOTA COORDINATING COMMITTEE FOR PUBLIC EDUCATION;
SCHOOL ADMINISTRATORS OF MINNESOTA;
MINNESOTA EDUCATION ASSOCIATION;
MINNESOTA FEDERATION OF TEACHERS;
MINNESOTA ASSOCIATION OF SCHOOL ADMINISTRATORS;

MINNESOTA ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS;

MINNESOTA ELEMENTARY SCHOOL PRINCIPALS ASSOCIATION;

MINNESOTA CONGRESS OF PARENT AND TEACHERS ASSOCIATIONS;

AMERICAN JEWISH CONGRESS;

JEWISH COMMUNITY RELATIONS COUNCIL OF MINNESOTA;

FIRST UNITARIAN SOCIETY OF MINNEAPOLIS;

MINNESOTA CONFERENCE OF SEVENTH DAY ADVENTISTS;

BRUCE A. OLANDER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

VALERIE V. OLANDER, by BRUCE A. OLANDER, as her Guardian ad Litam;

MRS. JANET M. SIGFORD, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

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WAYNE VAN KIRK, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
CALVIN DIDIER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
SAMUEL L. SCHEINER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

Intervenor-Petitioners, Louis Quast, Richard G. Conlin, Joseph L. Lewis and Manuel Rivera, pray that this Court issue its writ of certiorari to The Supreme Court of The State of Minnesota to review the judgment of that Court in Cause No. 43978, entered on December 27, 1974.

OPINIONS BELOW

The opinion of the District Court of Ramsey County, Minnesota, appears in the single Appendix submitted on behalf of the several petitioners, commencing at page A-71.

The opinion of the Supreme Court of The State of Minnesota is reported in —— Minn. ——, 224 N.W. 2d 344, and appears in the single Appendix submitted on behalf of the several petitioners, commencing at page A-107.

JURISDICTION

This action was brought in the District Court, Second Judicial District, Ramsey County, Minnesota, to enjoin the enforcement of a statute of The State of Minnesota as being in violation of the Constitution of the United States and the Constitution of the State of Minnesota. The District Court entered its judgment declaring the statute constitutional and, upon appeal. The Supreme Court of The State of Minnesota reversed and entered its judgment declaring the statute unconstitutional and violative of the Establishment Clause of the First Amendment of the United States Constitution; petition for rehearing was denied on December 26, 1974.

This Court has jurisdiction to review the judgment of the Supreme Court of The State of Minnesota under Title 28 U.S.C. Section 1257 (3).

STATUTE INVOLVED

The statute involved is Chapter 944 of the Laws of Minnesota, 1971, "Nonpublic School Education Costs; Credit" (codified as Minnesota Statutes Sec. 290.086 and Sec. 290.087), the full text of which is set forth in the single Appendix submitted on behalf of the several petitioners, commencing at page A-134.

QUESTIONS PRESENTED

The statute provides a tax credit, according to a set formula, on the state income tax of parents or legal guardians of children in kindergarten, elementary and secondary nonpublic schools, who have paid the nonpublic school educational costs, provided the nonpublic school meets the standards of the compulsory education law, is not operated for profit, and adheres to the provisions of the Civil Rights Act of 1964.

1. Is this statute to be tested under the Establishment Clause of the First Amendment by determing whether it will have "*any effect*" of advancing religion, as held by the Minnesota Supreme Court?

2. Is this statute to be tested under the Free Exercise Clause of the First Amendment on the basis that one must give "*clear preference to the Establishment Clause over the Freedom of Exercise Clause of The First Amendment*", as held by the Minnesota Supreme Court?

3. Does the denial of the benefits of the statute to a parent who has paid the educational costs of a child enrolled in a nonpublic religious school deny to such parent the equal protection of the laws?

4. Does the denial of the benefits of the statute to a parent who has paid the educational costs of a child enrolled in a nonpublic nonreligious school deny to such parent the equal protection of the laws?

APPLICABLE CONSTITUTIONAL PROVISIONS

1. The First Amendment to the Constitution provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .".

2. The Fourteenth Amendment to the Constitution provides in part: ". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws".

STATEMENT OF THE CASE

1. The Statute Involved

Chapter 944, Laws of Minnesota, 1971, passed by the Minnesota Legislature and signed into law by the Governor on June 7, 1971, grants an income tax credit, pursuant to a well defined formula, to an individual parent or guardian who pays education costs for a pupil in a nonpublic kindergarten, elementary, or secondary school which meets the standards of the compulsory education law, is not operated for profit, and adheres to the provisions of the Civil Rights Act of 1964, and thereby relieves the state of a substantial financial burden which the state would otherwise be required to bear.

The statute is an income tax statute and grants a tax credit to an individual taxpayer. No funds are appropriated by the state and no state funds are paid to any school, church, or other organization or to any teacher. If a nonpublic school meets the requirements of the compulsory education law, a parent can send his child to that school, rather than a public school, and qualify for an income tax credit as determined by the formula. The parent qualifies for the tax credit because he has relieved the state of the expense of furnishing his child a secular education.

The well defined formula strictly limits the amount of the tax relief a parent can receive. The formula insures that under no circumstances can the parent receive a tax credit in excess of the education costs actually expended by him; under no circumstances can the parent receive a tax credit in excess of the average per pupil "maintenance cost" of public schools or the state aid per pupil given the local public school districts; and under no circumstances can the parent receive a tax credit in excess of 80% of the per pupil "maintenance cost" of the nonpublic school attended. The "maintenance cost" of the nonpublic school is determined in exactly the same manner as is the "maintenance cost" of the public school.

Whether or not the nonpublic school attended also furnishes religious instruction never becomes an issue in the administration of the statute. The parent taxpayer sending a child to a nonreligious nonpublic school and the parent taxpayer sending a child to a religious nonpublic school are treated exactly alike because they have both done the same thing—they have relieved the state of the cost of the secular education of their children.

The application of the formula determining the amount of the tax credit assures that the tax credit is received only for

costs of secular education paid by the taxpayer. This formula supplies "an effective means of guaranteeing" that the tax credit will be received "exclusively for secular, neutral and nonideological purposes". The unique and well structured statute scrupulously avoids all the fatal deficiences which this Court has found in state legislation which it has struck down as being in violation of the Establishment Clause of the First Amendment.

2. The Proceedings Below

The Respondents (the plaintiffs below) brought the two actions which were consolidated herein naming the State of Minnesota and certain state officials as defendants alleging that the statute violated the Establishment, Free Exercise and Equal Protection Clauses of the Constitution and seeking an order enjoining the administration of the statute. Thereafter, two separate sets of parents of children enrolled in nonpublic religious schools and nonpublic nonreligious schools were allowed to intervene as Intervenor Defendants. The trial court, on July 6, 1972, after a long trial, made thorough, thoughtful and comprehensive Findings of Fact and Conclusions of Law and Memorandum supporting its judgment declaring that the statute was constitutional. On appeal, the Supreme Court of the State of Minnesota, in its opinion dated November 26, 1974, reversed and held that the statute is unconstitutional and violative of the Establishment Clause of the First Amendment of the United States Constitution as interpreted in *Committee for Public Education v. Nyquist*, 413 U.S. 765, 93 S.Ct. 2955, 37 L. ed. 2d 948 (1973). Petition for rehearing was denied December 26, 1974.

The Minnesota Supreme Court, in basing its reversal on the decision of this Court in *Nyquist*, reluctantly declared that the three part test established by this Court for Establishment Clause Questions and applied in *Walz v. Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 25 L. ed. 2d 697 (1970); *Tilton v. Richardson*, 403 U.S. 672, 91 S.Ct. 2091, 29 L. ed. 2d 790 (1971); *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L. ed. 2d 745 (1971); and *Earley v. DiCenso*, 403 U.S. 602, 91 S.Ct. 2105, 29 L. ed. 2d 745 (1971); no longer was the "standard of measurement of establishment questions". The Minnesota Supreme Court set forth in detail what the three part Establishment Clause Test was at the time the trial court made its decision, prior to *Nyquist*, namely, that (1) a statute must have a secular legislative purpose; (2) a statute's principal or primary effect must be one that neither advances nor inhibits religion; and (3) a statute must not foster excessive governmental entanglement with religion. (A-117, 118)

The Minnesota court then held as follows:

> "The trial court found that the statute had a valid secular purpose. We are in accord with that holding. The trial court also found that the statute survived entanglement challenges. A great deal of the trial court's lengthy and learned memorandum dealt with the disposition of the entanglement question. Finally, the trial court found that the primary effect of the statute was not to promote the establishment of religion. *Absent subsequent decision of the Supreme Court, such a finding was fully justified under the standards established by the Supreme Court in Tilton v. Richardson, supra.*" (Emphasis supplied.) (A-118, 119).

After analyzing *Nyquist* and its companion cases handed down the same day, to-wit, *Sloan v. Lemon*, 413 U.S. 825, 93 S.Ct. 2982, 37 L. ed. 2d 939 (1973); *Levitt v. Committee for Public Education*, 413 U.S. 472, 93 S.Ct. 2814, 37 L. ed. 2d 376 (1973); *Hunt v. McNair*, 413 U.S. 734, 93 S.Ct. 2868, 37 L. ed. 2d 923 (1973), the Court stated as follows:

> "In applying the three part test, we have no difficulty, as previously stated, in determining that the secular purpose objective and requirement is met. In applying the 'primary effects test', we must be guided by the realization, as indicated above, that *this is no longer a primary effects test, but an 'any effects test'*. Under such a standard, the legislation in question cannot pass constitutional muster." (Emphasis supplied.) (A-126).

The Minnesota court then considered the question of whether the Free Exercise Clause would salvage the statute under the constitutional mandates of *Nyquist* and its companion cases, and states as follows:

> "The majority opinion in Nyquist disregarding the balancing approach of Walz and related cases has chartered a new course, giving *clear preference to the Establishment Clause over the Freedom of Exercise Clause* of the First Amendment." (Emphasis supplied.) (A-127).

The Minnesota court then, by way of apology for a decision it felt forced to render, makes the following statement:

> "We would be remiss if we failed to comment upon the abject failure of our courts and the parties involved in this litigation to recognize that the major problem being dealt with here is society's concern for the children in-

volved. Surely the goal of our society is to provide the best possible educational opportunities to all of our youth." (A-128).

In his specially concurring opinion, Justice Yetka, expresses the apparent frustration of the Minnesota court:

"If this recent trend of decisions by the United States Supreme Court continues to its logical conclusion, the decision of Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409, 25 L. ed. 2d 697 (1970), appears in jeopardy.

"I do not fear that the legislation at issue in the instant case would somehow foster the establishment of any religion. There is a distinction between actively supporting a religion or religions, and offering private education the chance to exist and to be available to all parents—poor or middle class, as well as the wealthy—who choose to exercise the right to send their children to nonpublic schools.

"The strict scrutiny that legislation, such as that struck down today, must undergo appears far beyond the degree of protection necessary to insure that our nation will be free from a 'state religion' or religious persecution of its citizens. Rather, our legislature appears now to be barred from making any reasonable effort to insure that nonpublic education will survive except for the very wealthy. However, the highest court of our land has spoken, and this court and our legislature must adhere to its word." (A-129, 130).

THE QUESTIONS ARE SUBSTANTIAL

Chapter 944 is a model statute giving a reasonable amount of tax relief to Minnesota citizens who exercise their God given and constitutionally protected rights as parents to educate their children in nonpublic schools of their choice and who, in so doing, relieve the state and the taxpayers of Minnesota of the financial burden of educating their children. This is general welfare legislation which the Minnesota Legislature, speaking for the people and the taxpayers of Minnesota, deems desirable and equitable and deems to be absolutely necessary if Minnesota citizens are to be able to continue to exercise their constitutionally guaranteed choice between public and nonpublic schools.

The Minnesota court felt compelled to strike down this equitable tax relief statute because of what it erroneously believes the United States Supreme Court has mandated in the *Nyquist* decision. The Minnesota court's erroneous interpretation of *Nyquist* goes far beyond anything intended by this court and cries out for correction, lest it be a precedent for further drastic erosion of First Amendment and Fourteenth Amendment rights.

1. Establishment Clause Questions

If the Minnesota Supreme Court is correct in its interpretation of *Nyquist*, the cumulative criteria developed over a long period of time for testing legislation under the Establishment Clause, namely, "secular legislative purpose", "primary effect that neither advances nor inhibits religion", and "does not foster excessive governmental entanglement with reli-

gion", will have been discarded and will no longer be applicable. Gone will be the "benevolent neutrality" of which Chief Justice Burger spoke in *Walz*, and no longer will there be any neutral course between the two Religion Clauses. Any general welfare statute which in any way has the effect of giving a benefit to a person who has exercised his right to worship God according to the dictates of his conscience, or who elects to furnish his children religious education, will be invalid. Any indirect, remote or incidental benefit to a religious institution will be sufficient to invalidate any statute and there will be no need to inquire as to whether the statute has a secular purpose or whether government is involved with religion in any way.

Such a new interpretation of the Establishment Clause will have taken this clause to its ultimate extreme so that the "established religion" will be the religion which believes in nothing. The nonpublic school will become nonexistent except for the very rich. The public schools and their "value system", necessarily reflecting a secular humanistic philosophy, will have been fully "established" in the true sense of the word.

The petitioners submit, however, that the Minnesota court is in error and that this court in *Nyquist* did not intentionally establish an "any effects" test in place of the "primary effect" test in deciding that the New York legislation violated the Establishment Clause, even though Mr. Justice White, in his dissent, pointed out that that was what the court in effect was doing. Mr. Justice Powell, speaking for the majority in *Nyquist*, clearly states that "it is equally well established, however, that not every law that confers an 'indirect', 'remote', or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid". 413 U.S. at 772.

2. Free Exercise Clause Questions

If the Minnesota Supreme Court is correct in its interpretation of *Nyquist*, the Free Exercise Clause of the First Amendment is no longer on an equal footing with the Establishment Clause and is relegated to a strictly secondary position. Persons with religious convictions, who profess a belief in God and worship according to the dictates of their conscience and provide religious education for their children, would now be "second class citizens".

Such an interpretation of *Nyquist*, and its application in striking down Chapter 944, is clearly erroneous. This court in *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571 (1925), established once and for all that under the Free Exercise Clause a parent has an absolute right to send his child to a religious nonpublic school and that the Free Exercise Clause and the Establishment Clause are on equal footing. Nothing which this court has held in any case since has indicated anything other than what Mr. Chief Justice Burger stated in *Walz v. Tax Commission, supra*, namely,

> "The court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if extended to a logical extreme, would tend to clash with the other." 397 U.S. at 668.

This court has long recognized that nonpublic schools serve a tremendously important public purpose. *Board of Education v. Allen*, 392 U.S. 236, at 247-248 (1968). The legislature of the State of Minnesota, in recognition of that fact, by an overwhelming mandate from the people of the State of Minnesota, passed a general welfare statute, Chapter 944, designed to give tax relief to a class of people bearing an inequitable financial

burden, namely, parents who relieve the state, and other taxpayers, of a substantial financial burden by paying the full cost of educating their children in nonpublic schools. To hold that such tax relief is proper only if the parent has his child in a nonpublic school which does not teach religion, but not if the parent has his child in a nonpublic school which teaches religion, is to penalize that parent because of his religious convictions. *Pierce v. Society of Sisters, supra; Everson v. Board of Education,* 330 U.S. 1, 67 S.Ct. 504 (1947); *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526 (1972).

This court has assured "religious liberty" for all citizens by holding that the Free Exercise Clause and the Establishment Clause are co-equal. The Minnesota court's holding that the Free Exercise Clause is secondary is a denial of this religious liberty and must be corrected.

3. Equal Protection Clause Questions

The Minnesota court, by placing the Establishment Clause in a dominant position above the Free Exercise Clause and by stretching the application of the "primary effect" test, as noted above, has denied to parents who have children in nonpublic schools the equal protection of the laws, in violation of the Equal Protection Clause of the Fourteenth Amendment.

The Minnesota court struck down Chapter 944, as it applies to all parents of children in nonpublic schools, regardless of whether or not the school also teaches religion. Many of the nonpublic schools in Minnesota, as set forth in the record, are not religious schools. However, since the majority of nonpublic schools in Minnesota also teach religion, the Minnesota court apparently treated all nonpublic schools alike, as if they all taught religion, and struck down the statute for Establishment Clause reasons.

Chapter 944 provided for a general welfare tax benefit to parents with children in nonpublic schools and made no distinction between schools teaching religion and schools not teaching religion. As a result of the holding of the Minnesota court, those parents with children in nonpublic religious schools have been denied the benefits of the statute and penalized because the school taught religion, which is clearly a violation of the Equal Protection Clause. Those parents with children in nonpublic nonreligious schools have also been denied the benefits of the statute and penalized, but for no reason whatsoever, which is also clearly a violation of the Equal Protection Clause.

The Minnesota court's failure to even consider questions of equal protection should be corrected.

REASONS FOR GRANTING WRIT

The writ should issue because the decision of the Supreme Court of Minnesota is in outright conflict with this court's decision in *Committee for Public Education v. Nyquist*, 413 U.S. 756, 93 S.Ct. 2955, L. ed. 2d 948 (1973) and related cases. The misinterpretation of the holding of this court in *Nyquist* resulting in the striking down of Chapter 944 of the Laws of Minnesota, 1971, will do irreparable damage to a substantial number of Minnesota citizens who prefer to educate their children in nonpublic schools. The dangerous holding of the Supreme Court of Minnesota that the Establishment Clause invalidates any statute which has "any effect" which advances religion and that the Establishment Clause must be given "clear preference over the Freedom of Exercise Clause" threatens the very foundations of religious liberty.

CONCLUSION

The petitioners submit that the Supreme Court of Minnesota was in error in concluding that Chapter 944 of the Laws of Minnesota, 1971, is unconstitutional only because it fails a mythical new First Amendment test which requires that a statute not have "any effect" which advances religion and because of a mythical new constitutional principle giving "clear preference to the Establishment Clause over the Freedom of Exercise Clause". The questions presented by this petition for review involve the very preservation of constitutionally protected religious liberties. These questions are substantial and of major importance warranting full and complete consideration by this court.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

MAR 17 1975

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1166

STATE OF MINNESOTA, ET AL.,
Petitioners,

and

LOUIS QUAST, ET AL.,
Intervenors,
Petitioners,

and

JAMES P. LARKIN, ET AL.,
Intervenors,
Petitioners,

vs.

MINNESOTA CIVIL LIBERTIES UNION, ET AL.,
Respondents,

and

MINNESOTA COORDINATING COMMITTEE FOR PUBLIC EDUCATION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI BY THE STATE OF MINNESOTA, ET AL.

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TABLE OF CONTENTS

	PAGE
Minnesota Civil Liberties Union, et al., Summons and Complaint	A-1
Minnesota Coordinating Committee for Public Education, et al., Summons and Complaint	A-23
State of Minnesota Answer to the MCLU, et al. Complaint, dated February 9, 1972	A-47
State of Minnesota Answer to the MCCPE, et al. Complaint, dated February 14, 1972	A-50
Answer of Intervenor Defendants Louis Quast, et al. to both actions	A-53
Answer of Intervenor Defendants James P. Larkin, et al. to both actions	A-65
Lower Court Findings of Fact, Conclusions of Law, and Order for Judgment, and Memorandum of Law, Judge Plunkett, dated July 6, 1972	A-71
Opinion of the Minnesota Supreme Court filed November 26, 1974	A-107
Order of the Minnesota Supreme Court dated December 6, 1974, staying further proceedings pending the Petitions for Rehearing	A-131
Order of the Minnesota Supreme Court denying the Petitions for Rehearing, dated December 26, 1974	A-132
Judgment of the Minnesota Supreme Court reversing the Ramsey County District Court, dated December 27, 1974	A-133
Text of Statute in Question, Minn. Stat. §§ 290.086 and 290.087	A-134

APPENDIX

STATE OF MINNESOTA
County of Ramsey

DISTRICT COURT
Second Judicial District

MINNESOTA CIVIL LIBERTIES UNION,
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,
MATTHEW STARK, individually, and as a representative of the class of all taxpayers of the State of Minnesota,
DONALD F. KRAUSE, individually, and as a representative of the class of all taxpayers of the State of Minnesota,
KATHLEEN E. HAUSER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,
ROLFE E. HAUSER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,
CARL LUNDSTROM, individually, and as a representative of the class of all taxpayers of the State of Minnesota,
ELEANOR OTTERNESS, individually, and as a representative of the class of all taxpayers of the State of Minnesota.
WILLIAM B. OTTERNESS, individually, and as a representative of the class of all taxpayers of the State of Minnesota,
Plaintiffs,

vs.

STATE OF MINNESOTA,
ARTHUR C. ROEMER, Commissioner of Taxation, Income Tax Division, Department of Taxation, State of Minnesota,
GEROME T. CAULFIELD, Coordinator, Income Tax Division, Department of Taxation, State of Minnesota,

ROLLAND F. HATFIELD, Auditor, State of Minnesota,

HOWARD B. CASMEY, Commissioner of Education, State of Minnesota,

RICHARD L. BYE, DAVID C. BRANDON, DANIEL BURTON, B. ROBERT LEWIS, RALPH H. PETERSON, MARY JO RICHARDSON, GEORGE A. ROSSMAN, HENRY E. SCHROEDER AND LOUIS R. SMERLING, as members of the State Board of Education, State of Minnesota,

SAMUEL L. RICHARDSON, Commissioner, Department of Human Rights, State of Minnesota,

LEO C. BYRNE, Archbishop Coadjutor, JOHN GILBERT, Superintendent of Education, Roman Catholic Archdiocese of St. Paul-Minneapolis, Inc.,

KENNETH J. POVISH, Bishop, STANLEY BOURASSA, Superintendent of Education, Roman Catholic Diocese of Crookston, Inc.,

PAUL ANDERSON, Bishop, MARILYN MICKE, Superintendent of Education, Roman Catholic Diocese of Duluth, Inc.,

ALPHONSE J. SCHLADWEILER, Bishop, JOHN C. WARD, Superintendent of Education, Roman Catholic Diocese of New Ulm, Inc.,

GEORGE H. SPELTZ, Bishop, DAVID RIEDER, Superintendent of Education, Roman Catholic Diocese of St. Cloud, Inc.,

LORAS J. WATTERS, Bishop, JAMES D. HABIGER, Superintendent of Education, Roman Catholic Diocese of Winona, Inc.,

JOSHUA TARSIS, Director of Education, Torah Academy,

F. DOUGLAS HENDERSON, Headmaster, Breck School, Inc., Episcopal Diocese of Minnesota,

ARLENE ANDERSON, Dean, The Minnehaha Academy, Inc., Evangelical Covenant Church of America,

LYLE C. ANDERSON, Superintendent, Maplewood Academy, Minnesota Conference Association of Seventh Day Adventists, Inc.,

JOSEPH LEVANG, President, Hillcrest Lutheran Academy, Lutheran Brethren of America Synod,

MORTON SCHROEDER, Principal, St. Croix Lutheran High School, Twin City Lutheran High School Association, Inc.,

ALVIN KONIG, Director, Christian Reform Schools, Central Minnesota Christian School, Inc., Reform Churches,

JAMES HENDERSON, JR., Headmaster, The Blake School, Inc., as representative of the class of all private schools in the State of Minnesota,

Defendants.

SUMMONS

STATE OF MINNESOTA TO THE ABOVE-NAMED DEFENDANTS:

You are hereby summoned and required to serve upon plaintiffs' attorneys an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ LYNN S. CASTNER
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(Title of Cause)

COMPLAINT

Comes now the plaintiffs and for their causes of action state and allege:

1.

This action is instituted to obtain a declaratory judgment under and pursuant to the Uniform Declaratory Judgment Act of the State of Minnesota, ch. 555, and for injunctive relief, to test the validity of and to enjoin the execution of ch. 944 of Minnesota Statutes 1971, which provides tax credits and tax payments to parents of children attending religious and private

schools in the State of Minnesota. Chapter 944 of Minnesota Statutes 1971 is hereinafter called the 1971 Tax Payment-Tax Credit Act.

2.

The plaintiff Minnesota Civil Liberties Union (MCLU) is a Minnesota nonprofit corporation and is the Minnesota statewide affiliate of the American Civil Liberties Union (ACLU), a New York nonprofit corporation. MCLU has members throughout the State of Minnesota, and is devoted to the defense of rights and liberties under the U. S. Constitution and Bill of Rights, the Minnesota State Constitution and Federal and State laws, including the protection and extension of religious freedom and the separation of church and state.

3.

The plaintiff, Americans United for Separation of Church and State (AU), incorporated as Protestants and other Americans United for Separation of Church and State, is a District of Columbia nonprofit corporation, with a local chapter in Minneapolis, Minnesota, with members throughout the State of Minnesota, and is devoted to the protection of religious freedom and the separation of church and state under the U. S. Constitution, the Minnesota State Constitution, and Federal and State laws.

4.

The members and constituents of the organizational plaintiffs MCLU and AU are committed to the preservation of the right of all citizens to be free from state establishment of religion in that the use of all tax-raised funds, directly or indirectly, must never be used to support or maintain religious schools. They believe that all citizens are entitled to the free exercise of their religion which includes the right to be free

from the imposition of any tax, direct or indirect, which supports religious schools. They believe that if the many efforts throughout the country to syphon off public funds for nonpublic schools are successful and are not halted, the inevitable result will be the loss of our precious constitutional dual freedoms of religious liberty and the separation of church and state.

5.

Plaintiff Matthew Stark is president of the Minnesota Civil Liberties Union and is a taxpayer residing in the State of Minnesota, and appears as president of MCLU and as a representative of the class of all taxpayers in the State of Minnesota.

6.

Donald E. Krause is president of the Twin Cities Chapter of Americans United and is a taxpayer residing in the State of Minnesota, and appears as president of the Twin Cities Chapter of AU and as a representative of the class of all taxpayers in the State of Minnesota.

7.

Kathleen E. Hauser and Rolfe E. Hauser are taxpayers and parents of a preschool child, appearing as representatives of the class of all taxpayers in the State of Minnesota.

8.

Carl Lundstrom is a taxpayer residing in the State of Minnesota, and appears as a representative of the class of all taxpayers in the State of Minnesota.

9.

Eleanor and William B. Otterness are parents of children in public junior and senior high schools and are residents residing in the State of Minnesota, and appear as representatives of the class of all taxpayers in the State of Minnesota.

10.

Each of the individual plaintiffs, Stark, Krause, the Hausers, Lundstrom, and the Otternesses are citizens and residents of the State of Minnesota, and each pays taxes, including income taxes, in and to the State of Minnesota and the political subdivisions thereof. It is against the conscience of each of the individual plaintiffs herein to be forced by the operation of the taxing power to contribute to the propagation of religion or for the support of nonpublic schools. Each of the plaintiff taxpayers will fairly and adequately protect the interests of the class of all taxpayers in the State of Minnesota, the class is so numerous that joinder of all members is impracticable, all questions of law or fact are common to the class as a whole, and the claims of the representative taxpayers are typical of the claims of the class as a whole. The prosecution of this class action by these plaintiff taxpayers will result in an adjudication with respect to these individual taxpayer plaintiffs which would as a practical matter be dispositive of the interests of all other taxpayer members not parties to the action, and such adjudication will not substantially impair or impede their ability to protect the interests of all taxpayers in the State of Minnesota.

11.

The defendant State of Minnesota is a sovereign state of the United States, and is joined as a party to fairly and adequately determine the constitutionality of the 1971 Tax Payment-Tax Credit Act.

12.

Defendant Arthur C. Roemer is Commissioner of Taxation, Income Tax Division, Department of Taxation of the State of Minnesota, and he is joined in that capacity. He is responsible

under the Constitution and Laws of the State of Minnesota for the enforcement of the tax laws of the state, including the enforcement and implementation of the 1971 Tax Payment-Tax Credit Act.

13.

Gerome T. Caulfield is Coordinator, Income Tax Division, Department of Taxation of the State of Minnesota, and is joined in that capacity. He has been delegated the responsibility by defendant Commissioner Arthur C. Roemer of coordinating the enforcement of the 1971 Tax Payment-Tax Credit Act, and pursuant to that delegation has entered into permanent, complex, binding, entangling relationships with church and church school officials to carry out his duties of coordinating and implementing the 1971 Tax Payment-Tax Credit Act.

14.

Defendant Rolland F. Hatfield is Auditor of the State of Minnesota, and is joined in that capacity. He is empowered under Minnesota Statutes, §§6.01, 6.21, & 6.22 "to superintend and manage the fiscal concerns of the state" and to approve, if appropriate conditions are satisfied, "every receipt, account, bill, claim, refund, and demand against the state." He has the responsibility of approving all expenditures by the defendant State of Minnesota, including tax payments pursuant to the 1971 Tax Payment-Tax Credit Act.

15.

Defendant Howard B. Casmey is Commissioner of Education of the State of Minnesota, and is joined in that capacity. He is the chief executive officer for the State Department of Education who is empowered under Minnesota Statute §121.16 to "perform such duties as the law and the rules of the State board may provide . . . and he shall be charged with the exe-

cution of powers and duties which the State board may prescribe . . . to promote public education in the State, to safeguard the finances pertaining thereto, and to enable the State board to carry out the provisions of this code."

16.

Defendants Richard L. Bye, David C. Brandon, Daniel Burton, B. Robert Lewis, Ralph H. Peterson, May Jo Richardson, George A. Rossman, Henry E. Schroeder and Louis R. Smerling are members of the State Board of Education of the State of Minnesota and they are joined in their capacity as the State Board of Education. The defendant State Board of Education is a duly constituted public body established by Minnesota Statutes, §121.02, and it has the power under Minnesota Statutes, §121.11, to "exercise general supervision" over all public schools and public educational agencies.

17.

Defendant Casmey and the defendant State Board of Education, pursuant to the 1971 Tax Payment-Tax Credit Act, have entered into, and will continue in the future, a permanent, binding and complex entangling relationship with church and church school officials in the administration of said act.

18.

Defendant Samuel L. Richardson is Commissioner of the Department of Human Rights, State of Minnesota, and is joined in that capacity. Pursuant to Minnesota Statutes, ch. 363, the Commissioner and Department of Human Rights which he heads is charged with the responsibility to enforce the State Antidiscrimination Laws and to cooperate with national, state and local agencies in the exercise of his responsibilities. The 1971 Tax Payment-Tax Credit Act (ch. 944, §1, subd. 3) defines nonpublic schools as any elementary or secondary school

(which "adheres to the provisions of the Civil Rights Act of 1964.") The 1971 Tax Payment-Tax Credit Act will require the defendant Commissioner Richardson, and his department, to enter into a permanent, binding and complex entangling relationship with church and church school officials in the administration of said act.

19.

The United States Government and its Equal Employment Opportunity Commission, in the administration of Public Law 88-352, known as the Civil Rights Act of 1964, will be required to enter into a permanent, binding and complex entangling relationship with church and church school officials by reason of the requirements of the 1971 Tax Payment-Tax Credit Act, as alleged in Paragraph 18 of the complaint.

20.

Defendant Leo C. Byrne is the Archbishop Coadjutor and John Gilbert is the Superintendent of Education of the Roman Catholic Archiocese of St. Paul-Minneapolis, Inc.; defendant Kenneth J. Povish is the Bishop and defendant Stanley Bourassa is the Superintendent of Education of the Roman Catholic Diocese of Crookston, Inc.; defendant Paul Anderson is the Bishop and defendant Marilyn Micke is the Superintendent of Education of the Roman Catholic Diocese of Duluth, Inc.; defendant Alphonse J. Schladweiler is the Bishop and defendant John C. Ward is the Superintendent of Education of the Roman Catholic Diocese of New Ulm, Inc.; defendant George H. Speltz is the Bishop and defendant David Rieder is the Superintendent of Education of the Roman Catholic Diocese of St. Cloud, Inc.; defendant Loras J. Waters is the Bishop and defendant James D. Habiger is the Superintendent of Education of the Roman Catholic Diocese of Winona, Inc.; and defendant James

D. Habiger is the Superintendent of capacities. The respective, above-named corporate Roman Catholic dioceses are joined in their respective corporate capacities.

21.

Said Roman Catholic individual and corporate defendants, pursuant to the 1971 Tax Payment-Tax Credit Act, have entered into, and will continue in the future, a permanent binding and complex entangling relationship with the State of Minnesota and state officials in the administration of said act.

22.

Defendant Joshua Tarsis is Director of Education of the Torah Academy; defendant F. Douglas Henderson is Headmaster of Breck School, Inc., Episcopal Diocese of Minnesota; defendant Arlene Anderson is Dean of the Minnehaha Academy, Inc., Evangelical Covenant Church of America; defendant Lyle C. Anderson is Superintendent of the Maplewood Academy, Minnesota Conference Association of Seventh Day Adventists, Inc.; defendant Joseph Levang is President of Hillcrest Lutheran Academy, Lutheran Brethren of America Synod; defendant Morton Schroeder is Principal of St. Croix Lutheran High School, Twin City Lutheran High School Association, Inc.; and Alvin Konig is Director of the Christian Reform Schools, Central Minnesota Christian School, Inc., Reform Churches; and said individual defendants are joined in their respective capacities. Said corporate defendants are joined in their corporate capacities.

23.

Said individual and corporate defendants, above-named in Paragraph 22 of the complaint, have entered into, and will continue in the future, a permanent, binding and complex entangling relationship with the State of Minnesota and state offi-

cials in the administration of the 1971 Tax Payment-Tax Credit Act.

24.

Defendant James Henderson, Jr. is Headmaster of the Blake School, Inc., and is named as a representative of the class of all private, nonreligious schools in the State of Minnesota. Defendant Henderson and defendant Blake School, Inc. represent a class so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class, the claims or defenses of the representative defendants are typical of the claims or defenses of the class, and the representative defendant will fairly and adequately protect the interests of the class. The adjudications with respect to said defendants will be as a practical matter, dispositive of the interests of the other members not parties to the adjudications, and said adjudications will not substantially impair or impede said defendants' ability to protect their interests.

25.

On June 7, 1971, the Honorable Wendell Anderson, Governor of the State of Minnesota, signed into law the 1971 Tax Payment-Tax Credit Act, entitled "An Act relating to taxation; permitting credits against the state income tax for education costs for pupils in nonpublic elementary and secondary schools; amending Minnesota Statutes 1969, Chapter 290, by adding sections," (hereinafter referred to as the 1971 Tax Payment-Tax Credit Act). A copy of the 1971 Tax Payment-Tax Credit Act is annexed hereto, and incorporated herein, as Exhibit I.

26.

The 1971 Tax Payment-Tax Credit Act provides that taxes due under the computation in accordance with Minnesota Stat-

utes 1969, §290.06 shall be credited with the amount paid per student to others for education costs incurred in nonpublic schools in this state, subject to limitations in accordance with a formula set forth in said act. Said act further provides that if the allowable amount of the claim authorized as a tax credit thereunder exceeds the state income taxes otherwise due on the claimant's income in any year, or if there are no state income taxes due on the claimant's income in any year, the amount of the claim not used as an offset against income taxes shall be paid by the State of Minnesota to the claimant in the same manner as a refund for overpayment of a tax.

27.

The primary purpose and effect of the 1971 Tax Payment-Tax Credit Act is to aid nonpublic schools through payments under guise of "tax credit" of the educational costs of pupils attending such schools.

28.

The 1971 Tax Payment-Tax Credit Act on its face, and as applied, includes in its definition and operative provisions schools which:

a. Are controlled by churches or religious organizations.

b. Have as their purpose the teaching, propagation and promotion of particular religious faiths and beliefs, through their curricula, co-curricular programs and rules and regulations for teachers and students.

c. Limit admission on the basis of religion.

d. Require their students to receive instruction in the belief and tenets of particular religious faiths and dogmas.

e. Impose religious restrictions of what can be taught and what activities may take place within the school.

f. Require their students to attend religious services, display by garb, symbol, art and architecture particular religious faiths and dogmas.

g. Intermingle sectarian and secular instructions and activities.

29.

The financial aid which inures to the benefit of said nonpublic schools will generate political lobbying by church and church school officials and private and private school officials for even greater tax and other financial aids to religious and private schools.

30.

The 1971 Tax Payment-Tax Credit singles out and gives preferential and discriminatory treatment to particular groups of parents of children in private and religious schools, while failing to aid the parents of children in public schools in a same and similar manner.

31.

The 1971 Tax Payment-Tax Credit Act will provide financial aid which inures to the benefit of churches, religious organizations, religious schools and private schools, all of which do not pay taxes to the State of Minnesota.

32.

The 1971 Tax Payment-Tax Credit Act will encourage religious organizations and parents of children in religious schools bordering on the State of Minnesota to send their children to private and religious school in Minnesota in that parents of children attending religious and private schools in Minnesota receive financial aid pursuant to said act, while parents of children attending schools in Canada, Wisconsin, Iowa, North Dakota and South Dakota do not receive similar financial aid from their respective governments.

33.

Said parents, residing in Canada, Wisconsin, Iowa, North Dakota and South Dakota, who send their children to Minnesota private and religious schools will receive financial aid from the State of Minnesota, pursuant to said act, and will not pay taxes to the State of Minnesota.

34.

The 1971 Tax Payment-Tax Credit Act provides financial aid which inures to the benefit of religious and private schools, while failing to provide for any control by the State of Minnesota, its agencies or officials, over the budgets or expenses of said private and religious schools.

35.

The plaintiffs have no plain, speedy, or adequate remedy at law and will suffer irreparable injury unless a permanent injunction is granted. Unless enjoined by this Court, the defendant State of Minnesota and its above-named agencies and officials will administer the act according to its terms, and their construction thereof, in violation of the Minnesota and U. S. Constitutions as hereinafter set forth:

a. Art. 8, §2 of the Minnesota State Constitution provides:

> Public schools in each township to be established.
>
> Sec. 2. The legislature shall make such provisions, by taxation or otherwise, as, with income arising from the school fund, will secure a thorough and efficient system of public schools in each township in the State. Prohibition as to aiding sectarian school. But in no case shall the moneys derived as aforesaid, or any portion thereof, or any public moneys or property, be appropriated or used for

the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught. As amended Nov. 6, 1877, Formerly §3, Renumbered §2 by Laws 1961, Ex. Sess., c. 14, §3, adopted Nov. 6, 1962.

The 1971 Tax Payment-Tax Credit Act on its face and as applied violates said Art. 8, §2 of the Minnesota State Constitution in that said act provides for the appropriation or use of public moneys for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.

b. Art. 1, § 16 of the Minnesota State Constitution provides:

Freedom of conscience; no preference to be given to any religious establishment or mode of worship.

The enumeration of rights in this constitution shall not be construed to deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed, nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State, nor shall any money be drawn from the treasury for the benefit of any religious societies, or religious or theological seminaries.

The 1971 Tax Payment-Tax Credit Act on its face and as applied violates said Art. 1, § 16 of the Minnesota State Constitution in that said act compels the taxpayer plaintiffs and the class of all taxpayers in the State of Minnesota which they represent, to support places of worship or to maintain religious or ecclesiastical ministries against their consent and effects the drawing of money from the treasury for the benefit of religious societies or religious or theological seminaries.

c. Art. 9, § 1 of the Minnesota State Constitution provides:

Power of taxation; legislature may authorize.

The power of taxation shall never be surrendered, suspended or contracted away. Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes, but public burying grounds, public school houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property and houses of worship, institutions of purely public charity, and public property used exclusively for any public purpose, shall be exempt from taxation except as provided in this section, and there may be exempted from taxation personal property not exceeding in value $200, for each household, individual or head of a family, and household goods and farm machinery, as the legislature may determine; provided, that the legislature may authorize municipal corporations to levy and collect assessments for local improvements upon property benefited thereby without regard to a cash valuation. The legislature may by law define or limit the property exempt under this section, other than churches, houses of worship, and property solely used for educational pur-

poses by academies, colleges, universities and seminaries of learning. As amended, Nov. 3, 1970.

The 1971 Tax Payment-Tax Credit Act violates said Art. 9, §1 of the Minnesota State Constitution in that taxes are levied and collected for nonpublic purposes.

d. Art. 4, §33 of the Minnesota State Constitution provides:

Against special legislation.

In all cases when a general law can be made applicable, no special law shall be enacted, except as provided in Article XI; and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined without regard to any legislative assertion on that subject. The legislature shall pass no local or special law authorizing the laying out, opening, altering, vacating or maintaining roads, highways, streets or alleys; remitting fines, penalties or forfeitures; changing the names of persons, places, lakes or rivers; authorizing the adoption or legitimation of children; changing the law of descent or succession; conferring rights upon minors; declaring any named person of age; giving effect to informal or invalid wills or deeds, or affecting the estates of minors or persons under disability; exempting property from taxation or regulating the rate of interest on money; creating private corporations, or amending, renewing, extending or explaining the charters thereof; granting to any private corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever or authorizing public taxation for a private purpose. The

inhibitions of local or special laws in this section shall not be construed to prevent the passage of general laws on any of the subjects enumerated.

The legislature may repeal any existing special or local law, but shall not amend, extend or modify any of the same except as provided in Article XI. As amended Nov. 4, 1958.

The 1971 Tax Payment-Tax Credit Act violates said Art. 4, 833 of the Minnesota State Constitution, in that said act:

i. Is a special law granting to private corporations, associations, and individuals, to wit the defendant Roman Catholic Diocese corporations and all the schools they operate, The Torah Academy, The Breck School, The Minnehaha Academy, The Maplewood Academy, The Hillcrest Lutheran Academy, The St. Croix Lutheran High School, The Christian Reform School, The Blake School and all other religious and private schools meeting the requirements of the 1971 Tax Payment Tax Credit Act, and the parents of children in said schools, exclusive privileges and immunities.

ii, Grants to the private corporations, associations and individuals named in paragraph 35-d-ii above public taxation for private purposes.

e. The 1971 Tax Payment-Tax Credit Act on its face and as applied violates the Establishment Clause of the First Amendment to the U. S. Constitution, made applicable to the State of Minnesota by the Fourteenth Amendment, in that said act:

i. Appropriates tax-raised funds for the support of sectarian schools.

ii. Has as its purpose the advancement of religion.

iii. Has as a principal or primary effect the advancement of religion.

iv. Results in excessive government entanglement in religion, and

v. Results in excessive entanglement of religion with government.

f. The 1971 Tax Payment-Tax Credit Act on its face and as applied violates the Free Exercise Clause of the First Amendment to the U. S. Constitution, made applicable to the State of Minnesota by the Fourteenth Amendment, in that said act constitutes the imposition of a compulsory tax for religious purposes.

g. The 1971 Tax Payment-Tax Credit Act violates the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution in that the Minnesota State Legislature passed said act, and the governor of the State of Minnesota signed said act, because of a purported financial crisis in Roman Catholic and other parochial and private schools, which purported crisis does not in fact exist.

h. The 1971 Tax Payment-Tax Credit Act violates the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution in that said act in §1, subd. 4 provides that "Textbooks shall mean and include books and other instructional materials and equipment purchased through the nonpublic school of enrollment and used in nonpublic schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship," in that it is impossible to define, and said act provides no definitive

standards, for the definition of said religious tenets, doctrines or worship, which inculcate such tenets, doctrines or worship.

i. Th_ 1971 Tax Payment-Tax Credit Act violates the Equal Protection Clause of the Fourteenth Amendment to the U. S. Constitution in that said act:

i. Selects for financial aid a class of parents of children in religious and private schools, without any rational basis for making said classification, while denying financial benefits to parents of children in the public schools.

ii. Pursuant to subd. 3 includes aid to nonpublic schools "Wherein a resident of this state may legally fulfill the state's compulsory attendance laws," in that schools which are nonpublic but which do not fulfill the state's compulsory attendance laws, are arbitrarily not covered.

WHEREFORE, the plaintiffs pray for the following relief:

a. That the 1971 Tax Payment-Tax Credit Act (Minnesota Statutes 1971, ch. 944) be declared to be in violation of the Minnesota Statute Constitution: Art. 8, §2, Art. 1, §16, Art. 4, §33, & Art. 9, §1.

b. That said act be declared to be in violation of the Establishment and Free Exercise Clauses of the First Amendment to the U. S. Constitution, and of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U. S. Constitution.

c. That the defendants State of Minnesota, Arthur C. Roemer, Gerome T. Caulfield, Rolland F. Hatfield, Howard B. Casmey, Richard L. Bye, David C. Brandon, Daniel Burton, B. Robert Lewis, Ralph H. Peterson, May Jo Richardson, George A. Rossman, Henry E. Schroeder, Louis R. Smerling, and Samuel L. Richardson, and each of them, be permanently enjoined from in any way enforcing or administering the said 1971 Tax Payment-Tax Credit Act.

d. For such other and further relief as the Court may deem just and proper.

Dated: August 24, 1971.

/s/ LYNN S. CASTNER
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STATE OF MINNESOTA
County of Ramsey

DISTRICT COURT
Second Judicial District

MINNESOTA COORDINATING COMMITTEE FOR PUBLIC EDUCATION;
SCHOOL ADMINISTRATORS OF MINNESOTA;
MINNESOTA EDUCATION ASSOCIATION;
MINNESOTA FEDERATION OF TEACHERS;
MINNESOTA ASSOCIATION OF SCHOOL ADMINISTRATORS;
MINNESOTA ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS;
MINNESOTA ELEMENTARY SCHOOL PRINCIPALS ASSOCIATION;
MINNESOTA CONGRESS OF PARENT AND TEACHERS ASSOCIATIONS;
AMERICAN JEWISH CONGRESS;
JEWISH COMMUNITY RELATIONS COUNCIL OF MINNESOTA;
FIRST UNITARIAN SOCIETY OF MINNEAPOLIS;
MINNESOTA CONFERENCE OF SEVENTH DAY ADVENTISTS;
BRUCE A. OLANDER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
VALERIE V. OLANDER, by BRUCE A. OLANDER, as her Guardian ad Litem;
MRS. JANET M. SIGFORD, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
EDWARD HENKEN, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

FRANKLIN G. EMRICK, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
TOLLIE J. FLIPPIN, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
MRS. ROBERT ROSE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
EDWARD BOLSTAD, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
A. L. GALLOP, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
JAMES J. ROSASCO, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
DAVID W. MEADE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
MRS. AVIS NELSON, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
L. E. WERMAGER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
CHARLOTTE CARMAUCHE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
MARY VAN KIRK, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
WAYNE VAN KIRK, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
CALVIN DIDIER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
SAMUEL L. SCHEINER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

Plaintiffs,

vs.

STATE OF MINNESOTA;
ARTHUR C. ROEMER, Commissioner of Taxation, Income Tax Division, Department of Taxation, State of Minnesota;
HOWARD B. CASMEY, Commissioner of Education, State of Minnesota Board of Education, State of Minnesota;
VAL BJORNSON, Treasurer, State of Minnesota;
ROLLAND F. HATFIELD, Auditor, State of Minnesota;
Defendants.

SUMMONS

You, and each of you, are hereby summoned and required to serve upon plaintiff's attorney an answer to the complaint herein which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, plaintiffs will apply to the court for the relief prayed for you in the complaint.

HELGESEN, PETERSON,
ENBERG & SPECTOR
By /s/ ROGER PETERSON
Attorney for Minnesota
Coordinating Committee for
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Federation of Teachers,
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(Title of Cause)

COMPLAINT

THE STATE OF MINNESOTA TO THE ABOVE NAMED DEFENDANTS:

Come now the plaintiffs for their complaint and cause of action against the defendant, and each of them, state and allege:

I

The above captioned action is instituted to obtain a declaratory judgment under and pursuant to the Uniform Declaratory Judgment Act of Minnesota, M.S.A. Section 555, and for injunctive relief declaring the unconstitutionality under the State and Federal Constitutions and to enjoin the execution and performance of Chapter 944 of Minnesota Statutes, 1971, which provides tax credits and tax payments to parents of children attending parochial and private schools in the State of Minnesota. Chapter 944 of Minnesota Statutes 1971 is hereinafter called the Act. There exists a justiciable controversy as to the constitutionality of this Act which directly effects all taxpayers in the State of Minnesota. The plaintiffs having no adequate or speedy remedy at law are seeking a declaratory judgment and permanent injunction to prevent irreparable harm to themselves and all other persons in the same class and that time being of the essence, in accordance with Section 555.09 M.S.A. that a speedy trial be granted for the determination of the issues herein.

II

The plaintiff Minnesota Coordinating Committee for Public Education is an organization consisting of the following constituent organizations: Minnesota Citizens Committee on Public Education, Minnesota Congress of Parents and

Teachers, Minnesota School Board Association, Minnesota Education Association, Minnesota Federation of Teachers, Minnesota Elementary School Principals Association, Minnesota Association of Secondary School Principals, Minnesota Association of School Administrators, Minnesota Vocational Association, and Minnesota Association of County Superintendents.

The plaintiff School Administrators of Minnesota is an organization consisting of the following constituent organizations: Minnesota Association of School Administrators (Superintendents), Minnesota Association of Secondary School Principals, Minnesota Elementary School Principals Association, and the Minnesota Association of School Business Officials.

The plaintiff Minnesota Education Association is an organization of teachers in the State of Minnesota.

The plaintiff Minnesota Federation of Teachers is an organization of teachers in the State of Minnesota.

The plaintiff Minnesota Association of School Administrators is an organization consisting of school superintendents and assistant school superintendents in the State of Minnesota.

The plaintiff Minnesota Association of Secondary School Principals is an organization consisting of school principals and assistant school principals in the State of Minnesota.

The plaintiff Minnesota Elementary School Principals Association is an organization consisting of elementary school principals and assistant school principals in the State of Minnesota.

The plaintiff Minnesota Congress of Parent and Teachers Association is an organization consisting of the school districts' parent and teachers associations in the State of Minnesota.

The plaintiff Jewish Community Relations Council of Minnesota is a coordinating agency representing for the purpose ofthis action the following named Jewish organizations: Jewish War Veterans of the United States, National Council of Jewish Women-Minnesota sections, American Jewish Committee, Jewish Labor Committee, Workmen's Circle, Social Action Committees, a number of synagogues and temples in Minnesota and also a large number of delegates elected at large from throughtout the State of Minnesota.

The plaintiff American Jewish Congress is a national organization with a chapter in the State of Minnesota that works to eliminate all forms of racial and religious bigotry, to advance civil rights, protect civil liberties, defend religious freedom, and safeguard the separation of church and state.

The plaintiffs First Unitarian Society of Minneapolis, and the Minnesota Conference of Seventh Day Adventists are religious organizations and churches having a direct interest in the educational system of the State of Minnesota.

The constituents of the organizational plaintiffs are associations of individuals related in different ways to public education and committed to its preservation, believing as they do that the American public school system is one of the most precious contributions this nation has made to modern civilization. They believe further that if the many efforts throughout the country to siphon off public funds for nonpublic schools are successful and are not halted, the inevitable result will be a proliferation of private schools with an escalation of the exodus of middle class children from the public schools with the ultimate result of promoting two school systems in the United States—a public school system predominantly nonwhite, poor and inferior, and a private school system pre-

dominantly white, affluent and superior. Finally, all believe that use of tax-raised funds, directly or indirectly, to support or maintain religious schools violates the duel principle of religious liberty and the separation of church and state.

III

The plaintiff Valerie V. Olander by Bruce A. Olander as Guardian ad Litam individually and as a representative of all children enrolled in public schools in the State of Minnesota.

Each of the remaining individual plaintiffs is a citizen and resident of the State of Minnesota and each pays taxes including income tax in and to the State of Minnesota and the political subdivisions thereof. Each of these plaintiff taxpayers will fairly and adequately protect the interest of the class of all taxpayers in the State of Minnesota. The class is so numerous that joinder of all members is impractical, all questions of law or fact are common to the class as a whole and the claims of the representative taxpayers are typical of the claims of the claims of the class as a whole. The adjudication with respect to individual members of the class will as a practical matter be dispositive of the interests of other members not parties to the adjudications and will not substantially impair or impede their ability to protect the interests of all tax payers in the State of Minnesota.

It is against the conscience of each of the individual plaintiffs herein to be forced by the operation of the taxing power to contribute to the propagation of religion or for the support of non-public schools which, by purpose or effect, exclude children by reason of race or religion.

It is against their belief that public funds be appropriated for the support of schools wherein the distinctive doctrines of any religious sect are promulgated or taught.

It is against their belief that preference, by tax credits or otherwise, be given to any religious or private group to further foster their ideals and creeds and so separate our nation along sectarian lines in violation of the intent and purposes of our constitution, both state and federal.

It is against their belief and conscience to attempt to bypass or scheme to violate these fundamental constitutional requirements by technical, indirect, devious or frivolous arguments and acts, and by obtrusive methods, to foster legislation that attempts to circumvent these basic constitutional doctrines by high-sounding phrases, technical formulas, indirect payments, oblique benefits, or other similar capricious techniques.

It is against their belief to discriminate between citizens and particularly the poor, so as to benefit a few and to foster a separation of people because of religion, race, color or economic status.

It is with the same inherent fear that was held by our forefathers and the draftors of our constitution that acts of this type would intensify the danger of political fragmentation and devisiveness on religious lines, that they join as parties plaintiff in this action on behalf of themselves and all other citizens, to combat the use of public funds for religious purposes that will further divide our nation along sectarian lines.

IV

The defendant State of Minnesota is a sovereign state of the United States and is hereby joined as party defendant to fairly and adequately determine the constitutionality of the 1971 "Parochiaid" Tax Credit Act, ch. 944 of Minnesota Statutes 1971.

The defendant Arthur C. Roemer is the Commissioner of Taxation of the State of Minnesota, responsible under the Con-

stitution and Laws of Minnesota for the enforcement of the tax laws of the state, including Minnesota Statutes 1971, Chapter 944.

The defendant Howard B. Casmey is the Commissioner of Education of the State of Minnesota, responsible in part for the execution of Minnesota Statutes 1971, Chapter 944, together with the Board of Education.

The defendant Val Bjornson is the duly elected Treasurer of the State of Minnesota.

The defendant Rolland F. Hatfield is the duly elected Auditor of the State of Minnesota.

V

On June 7, 1971, the Governor of the State of Minnesota signed into law Statutes 1971, Chapter 944, entitled "An Act relating to taxation permitting credits against the state income tax for education costs for pupils in nonpublic elementary and secondary schools; amending Minnesota Statutes 1969, Chapter 290, by adding sections," (hereinafter referred to as the Act). A copy of the Act is annexed hereto, and marked Appendix A.

VI

The Act provides that taxes due under the computation in accordance with Minnesota Statutes 1969, Section 290.06 shall be credited with the amount paid per student to others for education costs incurred in non-public schools in this state, subject to limitations in accordance with a formula set forth in the Act. The Act further provides that if the allowable amount of the claim authorized as a tax credit thereunder exceeds the state income taxes otherwise due on the claimant's income in any year or if there are no state income taxes due on the claimant's income in any year, the amount of the claim not used as

an offset against income taxes shall be paid to the claimant in the same manner as a refund for overpayment of a tax.

VII

The Act on its face and, on information and belief, as construed by the defendants, includes in its definition and operative provisions schools which (a) are controlled by churches or religious organizations, (b) have as their purpose the teaching, propagation and promotion or particular religious faiths, (c) conduct their operations, curricula and programs to fulfill that purpose, (d) restrict admission on the basis of religion, (e) require their students to receive instruction in the tenets of a particular faith, (f) impose religious restrictions on what can be taught, (g) have religious indoctrination as a substantial purpose or activity, (h) require their students to attend religious services or (i) blend sectarian and secular instruction.

VIII

The purpose and effect of the Act is to grant direct state financial aid to nonpublic schools through payment under the guise of "tax credits" of the educational costs of pupils attending such schools. Although the effect of the Act is to aid all nonpublic schools, it was the purpose and intent of the legislation to aid schools described in the foregoing paragraph VII.

IX

Aid rendered to nonpublic schools will promote and perpetuate racial and socio-economic segregation in that private schools will thereby be enabled to increase their enrollment, which increase will be almost exclusively or at least disproportionately white, which in turn will increase the percentage of nonwhite enrollment in the public schools, thus aggravating de facto segregation and in turn strengthening the preference of many white parents to enroll their children in nonpublic

schools, which will in turn generate further political pressures for even greater tax aid to private schools, justified by the then increased enrollment, with the ultimate result of promoting two school systems in Minnesota—a public school system predominantly nonwhite, poor and inadequate, and a nonpublic school system predominantly white, affluent and superior.

X

Unless enjoined by this Court, the defendants will administer the Act according to its terms and their construction thereof, in violation of the Minnesota and Federal Constitutions as hereinafter set forth.

XI

The Act on its face and as construed by the defendants violates Minnesota Constitution, Article 8, Section 2 in that it provides for the appropriation or use of public moneys for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.

XII

The Act on its face and as construed by the defendants violates Minnesota Constitution, Article 1, Section 16 in that it compels plaintiffs to support places or worship or to maintain religious or ecclesiastical ministries against their consent and effects the drawing of money from the treasury for the benefit of religious societies or religious or theological seminaries.

XIII

The Act does not afford equal protection to all citizens of Minnesota, as the Act on its face constitutes preferential and class legislation and is discriminatory and is in violation of the Minnesota Constitution, Article 4, Section 33 and Article 9, Section 1, in that it is a "special law" authorizing public

taxation for a private purpose and constitutes using money collected through the general taxing power for a non-public purpose.

XIV

The Act on its face and as construed by defendants violates the Establishment Clause of the First Amendment to the United States Constitution, made applicable to the Establishment Clause of the First Amendment to the United States Constitution, made applicable to the States by the Fourteenth, in that it (a) appropriates tax-raised funds for the support of sectarian schools; (b) has as its purpose the advancement of religion; (c) has as a principal or primary effect the advancement of religion; and (d) results in excessive government entanglement in religion and results in excessive religious entanglement in government.

XV

The Act on its face and as construed by defendants violates the Equal Protection Clause of the 14th Amendment to the U. S. Constitution in that it is (a) discriminatory; (b) preferential; (c) constitutes distinctive and unreasonable class legislation. The Act discriminates against the poor, against those in public schools, against those not having children in private or parochial schools, against those having children in private or parochial schools, against those having children in public schools and against those having children in school not within the compulsory age limits, in that it extends to students both below the required age and above the required age of compulsory attendance laws.

XVI

The Act on its face and as construed by defendants violates the Free Exercise Clause of the First Amendment to the Fed-

eral Constitution in that it constitutes a compulsory tax for religious purposes.

XVII

The Act on its fact and as construed by defendants violates the due process clause of the Fourteenth Amendment to the United States Constitution in that (1) the Act itself is unconstitutionally vague, indefinite and uncertain; (2) the means selected and the result of the Act have no real and substantial relation to the object sought to be attained; (3) the Act constitutes special legislation designed to effect only specific individuals and is capricious, unreasonable and arbitrary in its substance and in its application.

XVIII

The Act on its face violates the Civil Rights Act of the United States, Section 1983, Title 42, and Section 1343 of Title 28, U.S.C.A. and the State of Minnesota Chapter 363 M.S.A. in that (a) will aggrevate de facto segregation; (b) encourage and support schools which are restricted as a practical matter as to sex and religion; (c) the Act will further encourage and support separation of students as to wealth, race, creed and color; (d) encourages and supports discrimination in the hiring of teachers and administrators in the private and parochial schools; (e) encourages and supports discrimination of students and teachers in organizations exempt from these Civil Rights Acts contrary to the purpose and intent of these acts; (f) will make a mockery of the Civil Rights Acts as it will in fact encourage and support the organization of educational establishments in violation of and exempt from these Acts, will encourage and support the transfer of students to these educational establishments, and in effect can be the repudiation of all civil rights in the field of education.

XIX

The Act does not have adequate safeguards or tests to provide for the credit or refund as there is no provision for audit, the state has little control over private and parochial schools; such schools are not subject to the Minnesota Department of Education; the church itself and the private trustees control the performance of the services paid for by the State. Inevitably the Act itself must require government involvement with the parochial and private schools in order to enforce the requirements of this Act. The government cannot totally ignore the right to a credit or refund or the application of the funds by the school as this would consitute gross neglect, and unreasonable and capricious application of public funds for private purposes. The accumulative impact of the entire relationship between the state and the private and parochial schools involves excessive entanglement between government and religion as prohibited by the constitution. Further, that the controls and surveillance measures necessary, including the power to audit and inspect the financial records of private and parochial related schools, creates an intimate and continuing excessive entangling relationship between church and state.

XX

The Act advances religion and provides the use of public funds to promote sectarian causes. The very reason for the schools to be in existence is the advancement of sectarian programs and thinking. The Act promotes and provides for the contributions of money for the propagation of a religious faith, thus intensifying political fragmentation and divisiveness on religious lines. Religion is ever present in classrooms, whether ideologically, by physical accoutrements, dress of teachers, presence of religious symbols, or the natural and sustained religious atmosphere. The potential for impermissible

fostering of religion is present. Religious authority pervades the school system. The school is dedicated to the teaching of a particular faith and all of its activities, the teaching of its teachers, the discipline by the church authorities, the ideological slanting of events, books, history or of a particular subject, are always present and must of necessity be present as these are the true aims and purposes of parochial schools. Neutrality is not inherent in these settings and cannot be made so by a few appropriate words. Doctrines and faith are not inculcated or advanced by neutrals.

XXI

The assistance provided for by this Act will and has already involved considerable political activity. Participants of parochial and private schools have stormed the state capitol with busloads of students, have saturated the members of the legislature with their literature, briefs and dissertations, and have employed all of the usual political campaign techniques to prevail. Candidates have been and will be forced to declare and vote to choose along partisan lines. Political division along religious lines has and will continue to result and questions of a religious nature have and will assume such importance in our legislatures and in our elections, that matters of government shall become secondary and the religious issue paramount, which is the evil the authors of our constitution sought to prevent. The potential divisiveness of such conflict is a threat to the normal political process and constitutes another assault on the impregnable wall between church and state.

XXII

The Act is discriminatory against the taxpayer of the State of Minnesota in that a non-resident, non-taxpayer of another state will be able to obtain a tax refund by sending his children

to a private or parochial school in the State of Minnesota and filing a Minnesota income tax return showing no income tax due and, therefore, will be eligible to receive the tax payment provided in this Act. This will encourage border state people to send their children to Minnesota for their education in private and parochial schools, thereby placing a further burden on the taxpayers of Minnesota.

XIII

The Act arbitrarily and wrongfully determines that 80 percent of the curriculum and teachings are secular and 20 percent religious without any history, experience, studies or factual knowledge, and without providing any procedure to so determine or any rules or criteria to maintain any such average in the private or parochial schools of this state. Such use of public funds is unreasonable and capricious and each year the Act is in effect, the result becomes more so as to the proportion is based on maintenance costs of public, elementary and secondary schools, and without any adjustment to "Education Costs", which includes tuition, classroom instructional fees and textbooks (except textbooks and material used in teaching religious tenets). This hodgepodge of legislation has no relation in fact, no procedure to determine the fairness of costs, either maintenance or educational, no procedure to enforce its requirements and is, therefore, arbitary, unreasonable, lacking foundation in fact, and a wholly imaginative formula to give payments, whatever they might amount to, to parochial and private schools.

XXIV

On information and belief these plaintiffs believe that the Catholic church and the private schools have instructed their schools to charge tuition or to increase tuition proportionate to the tax credit, thereby absorbing all the credit for the direct

benefit of the school. While payment provided by the Act is paid to the parents of the students, the taxpayer or parent becomes, in fact, a mere conduit for said payments leading directly back to the church sponsored institutions in that he must furnish proof that he has expended an amount of money at such institution in order to qualify for said payment.

XXV

The Act as it currently reads, opens the door to the establishment of privately operated secondary and elementary schools, either for profit or as a supplement to the public school. These schools will be formed in the metro area particularly, as parents seek to avoid integrated schools. Even though the Act specifically forbids the use of the funds for this purpose, it appears that the burden of proof would rest with the State to show that such a school was so organized.

The Act requires that these private schools meet the standards of the State Department of Education, so that these standards are met when a parent is a certificated teacher and undertakes to instruct his children at home. There is considerable question as to what constitutes a school for the purposes of this law.

XXVI

The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

XXVII

The plaintiffs pray that the following relief be granted:

(a) That Minnesota Statutes 1971, Chapter 944 be declared in violation of the Minnesota Constitution, Article 1, Section 16 and Article 8, Section 2, and Article 4, Section 33, and Article 9, Section 1.

(b) That it be declared to be in violation of the Establisment and Free Exercise Clauses of the First Amendment to the United States Constitution as made applicable to the State, by the 14th Amendment and the due process and equal protection clause of the U. S. Constitution, and the Federal and State Civil Rights Acts.

(c) That it be declared void as unreasonable, arbitrary, and capricious.

(d) That the defendants and each of them be enjoined from in any way enforcing or administering the said statute.

(e) That a preliminary injunction pending the trial of the issues be granted to the plaintiffs against the defendants herein for the relief set forth herein.

(f) That the plaintiffs be granted such other and further relief as the Court may deem just and proper.

Dated September 14, 1971.

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(Title of Cause)

ANSWER OF STATE DEFENDANTS

MCLU Complaint

File No. 379,526

Comes now the State of Minnesota, Arthur C. Roemer, Commissioner of Taxation, State of Minnesota, Gerome T. Caulfield, Coordinator, Income Tax Division, Department of Taxation, State of Minnesota; Rolland F. Hatfield, Auditor, State of Minnesota; Howard B. Casmey, Commissioner of Education, State of Minnesota; Richard L. Bye, David C. Brandon, Daniel Burton, B. Robert Lewis, Ralph H. Peterson, Mary Jo Richardson, George A. Rossman, Henry E. Schroeder and Louis R. Smerling, as members of the State Board of Education, State of Minnesota, Samuel L. Richardson, Commissioner, Department of Human Rights, State of Minnesota, and Val Bjornson, Treasurer, State of Minnesota, and for their Answer to the Complaint herein, state and allege as follows:

1. Deny each and every matter and thing contained in Plaintiff's complaint, except that which is specifically admitted or otherwise qualified herein.

2. So far as any response is required to Paragraph 1, admit the same.

3. Admit Paragraphs 2 and 3.

4. As to Paragraph 4, the answering Defendants are without information or belief as to the matters contained therein, and therefore deny the same.

5. As to Paragraph 5, admit that Plaintiff Matthew Stark is President of the Minnesota Civil Liberties Union and is a taxpayer residing in the State of Minnesota, but deny that he is a proper class representative of all taxpayers in the State of Minnesota.

6. As to Paragraph 6, admit that Donald E. Krause is President of the Twin Cities Chapter of Americans United and is a taxpayer residing in the State of Minnesota, but deny that he is a proper class representative of all taxpayers in the State of Minnesota.

7. As to Paragraphs 7, 8 and 9, answering Defendants are without information and belief as to the matters contained therein and therefore deny the same.

8. As to Paragraph 10, deny that the individuals named therein are proper representatives of the class of all taxpayers of the State of Minnesota, and deny further that the claims of the representative taxpayers are typical of the claims of the class as a whole.

9. Admit paragraphs 11 and 12.

10. As to Paragraph 13, admit that Mr. Caulfield is the Coordinator, Income Tax Division, Department of Taxation, and that he has been delegated the responsibility by Commissioner Arthur C. Roemer of coordinating the reporting aspects of Laws 1971, Chapter 944, but deny that he has entered into any permanent, complex, binding or entangling relationships with any church or church school officials in the execution of his official duties.

11. Admit Paragraphs 14, 15 and 16.

12. Deny Paragraph 17, and state further that neither the Commissioner of Education nor the State Board of Education have any official duties imposed upon them by Laws 1971, Chapter 944.

13. As to Paragraph 18, admit that Samuel L. Richardson is the Commissioner of the Department of Human Rights, State of Minnesota; that he has certain official duties as set forth in Laws of Minnesota, Chapter 363, and that Laws 1971,

Chapter 944, requires a non-public school, among other things, to adhere to the provisions of the federal Civil Rights Act of 1964. Defendants state further that Commissioner Richardson has no official duties imposed upon him by Laws 1971, Chapter 944.

14. Deny Paragraph 19.

15. As to Paragraphs 20, 21, 22, 23 and 24, state that these answering Defendants are without information and belief as to the matters contained therein, and therefore deny the same.

16. Admit Paragraphs 25 and 26.

17. Deny Paragraph 27.

18. As to Paragraph 28, state that they are without information and belief as to the matters contained therein, and therefore deny the same.

19. Deny Paragraphs 29, 30, 31, 32, 33, 34 and 35.

DEFENSES

For their further and other Defenses, answering Defendants state and allege as follows:

1. The Complaint fails to state a claim upon which relief can be granted.

2. The organizational Plaintiffs herein, the Minnesota Civil Liberties Union and the Americans United for the Separation of Church and State, lack standing to commence this action.

3. A proper class action was neither pleaded by the Plaintiffs nor determined by the Court pursuant to Minnesota Rules of Civil Procedure, Rule 23.03.

WHEREFORE, the Answering Defendants pray as follows:

(a) That Laws 1971, Chapter 944, be declared constitutional in all respects;

(b) That Defendants be awarded their costs and disbursements herein;

(c) That the Court grant such other and further relief as is just and equitable.

Dated at St. Paul, Minnesota, this 9th day of February, 1972.

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/s/ JOHN R. KENEFICK
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Attorneys for Defendants

(Title of Cause)

ANSWER
[MCCPE Complaint]
File No. 380252

Comes now the Defendants State of Minnesota, Arthur C. Roemer, Commissioner of Taxation, State of Minnesota, Howard B. Casmey, Commissioner of Education, State of Minnesota, Val Bjornson, Treasurer, State of Minnesota, and Rolland F. Hatfield, Auditor, State of Minnesota, and for their joint Answer to the Complaint of Plaintiffs served herein, state and allege as follows:

1. Deny each and every matter and thing alleged in Plaintiffs' Complaint except that which is specifically admitted or otherwise qualified herein.

2. As to Paragraph I, admit that the above action was instituted to obtain declaratory and injunctive relief, and that there now exists a justiciable controversy as to the constitu-

tionality of Laws 1971, Chapter 944; deny the remaining allegations and legal conclusions contained in Paragraph I.

3. As to Paragraph II, state that they are without information or belief concerning the organizational Plaintiffs, their constituent members or their purposes, and therefore deny the allegations contained therein. State further that the beliefs of said organizational Plaintiffs or their individual members are immaterial.

4. As to Paragraph III, state that they are without information or belief as to the status or representative nature of the individual Plaintiffs, and therefore deny that said individual Plaintiffs are proper class representatives. State further that the beliefs or conscience of the individual Plaintiffs are immaterial.

5. As to Paragraph IV, admit that the State of Minnesota is a sovereign state and is properly joined to determine the constitutionality of Laws 1971, Chapter 944; admit that Arthur C. Roemer is the Commissioner of Taxation, responsible for the enforcement and implementation of certain tax laws of this State, including Laws 1971, Chapter 944. Admit further that Val Bjornson is the duly elected Treasurer and Rolland F. Hatfield is the duly elected Auditor of the State of Minnesota. Admit that Howard B. Casmey is the Commissioner of Education of the State of Minnesota, but deny that he or the State Board of Education is in any way responsible for the execution or implementation of Laws 1971, Chapter 944.

6. Admit Paragraph V.

7. Admit Paragraph VI as containing a general description of the operation of Laws 1971, Chapter 944.

8. As to Paragraph VII, state that they are without information or belief as to the matters contained therein, and therefore deny the same.

9. Deny Paragraphs VIII and IX.

10. As to Paragraph X, admit that Defendants will administer Laws 1971, Chapter 944, according to its terms unless enjoined by the Court; deny the remainder of said Paragraph.

11. Deny Paragraphs XI, XII, XIII, XIV, XV, XVI, XVII, and XVIII.

12. As to Paragraph XIX, admit that there is no specific audit provision in Laws 1971, Chapter 944, and private and parochial schools are not subject to the supervision of the Minnesota Department of Education. Deny the remainder of said Paragraph.

13. State that they are without information or belief as to the allegations and legal conclusions stated in Paragraph XX, and therefore deny the same.

14. State that Paragraph XXI has been stricken as immaterial by Order of Judge J. Jerome Plunkett, dated February 1, 1972.

15. Deny Paragraph XXII.

16. Deny Paragraph XXIII.

17. State that they are without information or belief as to the matters contained in Paragraph XXIV, and therefore deny the same.

18. Deny Paragraphs XXV, XXVI, and XXVII.

DEFENSES

For their further and other defenses, Defendants state and allege as follows:

1. The Complaint fails to state a claim upon which relief can be granted.

2. The organizational Plaintiffs herein lack standing to commence this action.

3. A proper class action was neither pleaded by the Plaintiffs nor determined by the Court pursuant to Minnesota Rules of Civil Procedure, Rule 23.03.

WHEREFORE, Defendants pray as follows:

(a) That Laws 1971, Chapter 944, be declared constitutional in all respects.

(b) That Defendants be awarded their costs and disbursements herein,

(c) That the Court grant such other and further relief as is just and equitable.

Dated: February 14, 1972.

WARREN SPANNAUS
Attorney General
/s/ JOHN R. KENEFICK
Deputy Attorney General
249 Centennial Of. Bldg.
St. Paul, Minnesota 55145
Attorneys for Defendants

(Title of Cause)

ANSWER OF INTERVENOR DEFENDANTS LOUIS QUAST, RICHARD G. CONLIN, JOSEPH L. LEWIS AND MANUEL RIVERA

File Nos. 379526, 380252

Intervenor defendants Quast, Conlin, Lewis and Rivera for their answer to the complaint of plaintiffs in File No. 379526 herein state and allege as follows:

I

Intervenor defendant Louis Quast resides at 2127 Inglehart Avenue in the City of St. Paul, Minnesota, is employed as a

salesman by Hoerner Waldorf Co., St. Paul, Minnesota, has paid and is paying income taxes, property taxes and sales taxes to the State of Minnesota or political subdivisions thereof, and is the parent of four children, two of whom attend a non-public elementary or secondary school meeting the qualifications of Minnesota Laws 1971, Chapter 944, to-wit: Paul Quast, age 17, a student in the twelfth grade at St. Paul Academy in St. Paul, Minnesota, and Gary Quast, age 17, a student in the twelfth grade at Cretin High School in St. Paul, Minnesota. That said intervenor defendant Louis Quast has paid tuition and education costs for said children attending said non-public schools during the calendar year 1971 and meets the requirements under Minnesota Laws, 1971, Chapter 944, for him to claim a tax credit on his Minnesota Income Tax Return for the year 1971 as provided for in said law.

II

Intervenor defendant Richard G. Conlin resides at 2275 Riverwood Place in the City of St. Paul, Minnesota, is self-employed, has paid and is paying income taxes, property taxes, and sales taxes to the State of Minnesota or political subdivisions thereof, and is the parent of five children, two of whom attend a non-public elementary or secondary school meeting the qualifications of Minnesota Laws 1971, Chapter 944, to-wit: Patrick Conlin, age 13, a student in the eighth grade at St. Mark's Elementary School in St. Paul, Minnesota, and Richard Conlin, Jr., age 17, a student in the twelfth grade at Benilde High School in Minneapolis, Minnesota. That said intervenor defendant Richard G. Conlin has paid tuition and education costs for said children attending said non-public schools during the calendar year 1971 and meets the requirements necessary under Minnesota Laws 1971, Chapter 944,

for him to claim a tax credit on his Minnesota Income Tax Return for the year 1971, as provided by said law.

III

Intervenor defendant Joseph L. Lewis resides at 583 Carroll Avence in the City of St. Paul, Minnesota, is employed as a senior technical writer for Remington Rand Univac, in Roseville, Minnesota, has paid and is paying income taxes, property taxes, and sales taxes to the State of Minnesota or political subdivisions thereof, and is the parent of six children, one of whom attends a non-public elementary or secondary school meeting the qualifications of Minnesota Laws 1971, Chapter 944, to-wit: Gwendolyn Lewis, page 11, a student in the sixth grade at Project Discovery in St. Paul, Minnesota. That said intervenor defendant Joseph L. Lewis has paid tuition and education costs for said child attending said non-public school during the calendar year 1971 and meets the requirements necessary under Minnesota Laws 1971, Chapter 944, for him to claim a tax credit on his Minnesota Income Tax Return for the calendar year 1971, as provided by said law.

IV

Intervenor defendant Manuel Rivera resides at 556 Wyoming in the City of St. Paul, Minnesota, is a construction electrician, presently employed as an electrician, has paid and is paying income taxes, property taxes and sales taxes to the State of Minnesota or political subdivisions thereof, and is the parent of seven children, six of whom attend a non-public elementary or secondary school meeting the qualifications of Minnesota Laws 1971, Chapter 944, to-wit: Eunice Rivera, age 8, a student in the third grade at Project Discovery in St. Paul Minnesota, Louise Rivers, age 9, a student in the fourth grade at Project Discovery in St. Paul, Minnesota, Kenneth John

Rivera, age 10, a student in the fifth grade at Project Discovery in St. Paul, Minnesota, Linda Rivera, age 12, a student in the sixth grade at Project Discovery in St. Paul, Minnesota, Elizabeth Rivera, age 13, a student in eight grade at Project Discovery in St. Paul, Minnesota, and Robert Rivera, age 14, a student in the eight grade at Project Discovery in St. Paul, Minnesota. That said intervenor defendant Manuel Rivera has paid tuition and education costs for said children attending said non-public school during the calendar year 1971 and meets the requirements under Minnesota Laws 1971, Chapter 944, for him to claim a tax credit on his Minnesota Income Tax Return for the calendar year 1971, as provided in said law.

V

Each of the intervenor defendants for many years past has been and is now a resident of the State of Minnesota paying income taxes, property taxes, and sales taxes to the State of Minnesota or political subdivisions thereof, and each is a parent of children attending non-public schools meeting the requirements of Minnesota Laws 1971, Chapter 944, and each has paid tuition and education costs for said children during the calendar year 1971 so as to qualify for a tax credit on Minnesota Income Tax Returns for the calendar year 1971. That each of the intervenor defendants will fairly and adequately protect the interests of the class of taxpayers who meet the requirements necessary to qualify for a tax credit pursuant to the provisions of said law, a class which is so numerous that joinder of all members is impractical; that all questions of law or fact are common to the class as a whole and the claims of the representative taxpayers are typical of the claims of the class as a whole. That the defense of the constitutionality of Minnesota Laws 1971, Chapter 944, by these intervenor defen-

dants in this class action will result in an adjudication with respect to the individual taxpayers entitled to a tax credit under said law which would, as a practical matter, be dispositive of the interests of all other taxpayers qualifying for a tax credit under said law who are not parties to this action, and such adjudication will not substantially impair or impede their ability to protect the interests of all such taxpayers claiming such tax credit under said law in the State of Minnesota.

FIRST DEFENSE

I

The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

I

Intervenor defendants allege that plaintiffs and each of them lack standing to challenge the constitutionality of Minnesota Laws 1971, Chapter 944, on their own behalf, individually, or as a class action whether alone or in conjunction with each other.

THIRD DEFENSE

I

Intervenor defendants deny each and every allegation, matter and thing contained in said complaint except as hereafter pleaded.

II

Intervenor defendants admit that plaintiff's action is instituted to obtain a declaratory judgment concerning the constitutionality of Minnesota Laws 1971, Chapter 944.

III

Intervenor defendants specifically deny that plaintiffs meet the requirements necessary to maintain a class action herein on behalf of a class of all taxpayers in the State of Minnesota.

IV

Intervenor defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 20, 22 and 24 of plaintiffs' complaint and therefore deny the same.

V

Intervenor defendants admit that the State of Minnesota is a sovereign state; that Arthur C. Roemer is Commissioner of Taxation for the State of Minnesota; that Gerome T. Caulfield is Co-ordinator, Income Tax Division, Department of Taxation, State of Minnesota; that Rolland F. Hatfield is Auditor of the State of Minnesota; that Howard B. Casmey is Commissioner of Education of the State of Minnesota; and that Val Bjornson is Treasurer of the State of Minnesota.

VI

Intervenor defendants admit that on June 7, 1971, the Governor of the State of Minnesota signed into law Minnesota Laws 1971, Chapter 944.

VII

Intervenor defendants admit that Minnesota Laws 1971, Chapter 944, provides that a taxpayer shall be given an income tax credit, based upon a formula, for tuition and education costs paid as a parent or natural guardian for a student in a qualified non-public elementary or secondary school.

AFFIRMATIVE DEFENSE

I

That Minnesota Laws 1971, Chapter 944, does not violate any provision of the constitution of the State of Minnesota or the constitution of the United States and is a valid law of the State of Minnesota in full force and effect.

WHEREFORE, intervenor defendants, and each of them, pray the Court that plaintiffs' complaint be dismissed and that

all relief requested therein be denied and that the Court enter its declaratory judgment declaring that Minnesota Laws 1971 Chapter 944, is not in violation of any provisions of the Minnesota State Constitution or the United States Constitution and that it is a valid law of the State of Minnesota in full force and effect and that these intervenor defendants have their costs and disbursements herein.

MEIER, KENNEDY & QUINN
By /s/ TIMOTHY P. QUINN
Attorneys for Intervenor
Defendants
430 Minnesota Building
St. Paul, Minnesota 55101

Intervenor defendants Quast, Conlin, Lewis and Rivera for their answer to the complaint of plaintiffs in File No. 380252 herein state and allege as follows:

I

Intervenor defendant Louis Quast resides at 2127 Iglehart Avenue in the City of St. Paul, Minnesota is employed as a salesman by Hoerner Waldorf Co., St. Paul, Minnesota, has paid and is paying income taxes, property taxes and sales taxes to the State of Minnesota or political subdivisions thereof, and is the parent of four children, two of whom attend a non-public elementary or secondary school meeting the qualifications of Minnesota Laws 1971, Chapter 944, to-wit: Paul Quast, age 17, a student in the twelfth grade at St. Paul Academy in St. Paul, Minnesota, and Gary Quast, age 17, a student in the twelfth grade at Cretin High School in St. Paul, Minnesota. That said intervenor defendant Louis Quast has paid tuition and education costs for said children attending said

non-public schools during the calendar year 1971 and meets the requirements necessary under Minnesota Laws 1971, Chapter 944, for him to claim a tax credit on his Minnesota Income Tax Return for the year 1971 as provided in said law.

II

Intervenor defendant Richard G. Conlin resides at 2275 Riverwood Place in the City of St. Paul, Minnesota, is self-employed, has paid and is paying income taxes, property taxes, and sales taxes to the State of Minnesota or political subdivisions thereof, and is the parent of five children, two of whom attend a non-public elementary or secondary school meeting the qualifications of Minnesota Laws 1971, Chapter 944, to-wit: Patrick Conlin, age 13, a student in the eight grade at St. Mark's Elementary School in St. Paul, Minnesota, and Richard Conlin, Jr., age 17, a student in the twelfth grade at Benilde High School in Minneapolis, Minnesota. That said intervenor defendant Richard G. Conlin has paid tuition and education costs for said children attending said non-public schools during the calendar year 1971 and meets the requirements necessary under Minnesota Laws 1971, Chapter 944, for him to claim a tax credit on his Minnesota Income Tax Return for the year 1971, as provided by said law.

III

Intervenor defendant Joseph L. Lewis resides at 583 Carroll Avenue in the City of St. Paul, Minnesota, is employed as a senior technical writer for Remington Rand Univac in Roseville, Minnesota, has paid and is paying income taxes, property taxes, and sales taxes to the State of Minnesota or political subdivisions thereof, and is the parent of six children, one of whom attends a non-public elementary or secondary school meeting the qualifications of Minnesota Laws 1971, Chapter

944, to-wit: Gwendolyn Lewis, age 11, a student in the sixth grade at Project Discovery in St. Paul, Minnesota. That said intervenor defendant Joseph L. Lewis has paid tuition and education costs for said child attending said non-public school during the calendar year 1971 and meets the requirements necessary under Minnesota Laws 1971, Chapter 944, for him to claim a tax credit on his Minnesota Income Tax Return for the calendar year 1971, as provided in said law.

IV

Intervenor defendant Manuel Rivera, resides at 556 Wyoming in the City of St. Paul, Minnesota, is a construction electrician, presently employed as an electrician, has paid and is paying income taxes, property taxes and sales taxes to the State of Minnesota or political subdivision thereof, and is the parent of seven children, six of whom attend a non-public elementary or secondary school meeting the qualifications of Minnesota Laws 1971, Chapter 944, to-wit: Eunice Rivera, age 8, a student in the third grade at Project Discovery in St. Paul, Minnesota, Louise Rivera, age 9, a student in the fourth grade at Project Discovery in St. Paul, Minnesota, Kenneth John Rivera, age 10, a student in the fifth grade at Project Discovery in St. Paul, Minnesota, Linda Rivera, age 12, a student in the sixth grade at Project Discovery in St. Paul, Minnesota, Elizabeth Rivera, age 13, a student in the eighth grade at Project Discovery in St. Paul, Minnesota, and Robert Rivera, age 14, a student in the eighth grade at Project Discovery in St. Paul, Minnesota. That said intervenor defendant Manuel Rivera has paid tuition and education costs for said children attending said non-public school during the calendar year 1971 and meets the requirements under Minnesota Laws 1971, Chapter 944, for him to claim a tax credit on his

Minnesota Income Tax Return for the calendar year 1971, as provided in said law.

V

Each of the intervenor defendants for many years past has been and is now a resident of the State of Minnesota paying income taxes, property taxes, and sales taxes to the State of Minnesota or political subdivisions thereof, and each is a parent of children attending non-public schools meeting the requirements of Minnesota Laws 1971, Chapter 944, and each has paid tuition and education costs for said children during the calendar year 1971 so as to qualify for a tax credit on Minnesota Income Tax Returns for the calendar year 1971. That each of the intervenor defendants will fairly and adequately protect the interests of the class of taxpayers who meet the requirements necessary to qualify for a tax credit pursuant to the provisions of said law, a class which is so numerous that joinder of all members is impractical; that all questions of law or fact are common to the class as a whole and the claims of the representative taxpayers are typical of the claims of the class as a whole. That the defense of the constitutionality of Minnesota Laws 1971, Chapter 944, by these intervenor defendants in this class action will result in an adjudication with respect to the individual taxpayers entitled to a tax credit under said law which would as a practical matter, be dispositive of the interests of all other taxpayers qualifying for a tax credit under said law who are not parties to this action, and such adjudication will not substantially impair or impede their ability to protect the interest of all such taxpayers claiming such tax credit under said law in the State of Minnesota.

FIRST DEFENSE

I

The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

I

Intervenor defendants allege that plaintiffs and each of them lack standing to challenge the constitutionality of Minnesota Laws 1971, Chapter 944, on their own behalf, individually, or as a class action whether alone or in conjunction with each other.

THIRD DEFENSE

I

Intervenor defendants deny each and every allegation, matter and thing contained in said complaint except as hereafter pleaded.

II

Intervenor defendants admit that plaintiffs' action is instituted to obtain a declaratory judgment concerning the constitutionality of Minnesota Laws 1971, Chapter 944.

III

Intervenor defendants specifically deny that plaintiffs meet the requirements necessary to maintain a class action herein on behalf of a class of all taxpayers in the State of Minnesota.

IV

Intervenor defendants admit that the State of Minnesota is a sovereign state, that Arthur C. Roemer is the Commissioner of Taxation of the State of Minnesota, that Howard B. Casmey is the Commissioner of Education of the State of Minnesota, that Val Bjornson is the Treasurer of the State of Minnesota, and Rolland F. Hatfield is the Auditor of the State of Minnesota.

V

Intervenor defendants admit that on June 7, 1971, the Governor of the State of Minnesota signed into law Minnesota Laws 1971, Chapter 944.

VI

Intervenor defendants admit that Minnesota Laws 1971, Chapter 944, provides that a taxpayer shall be given an income tax credit, based upon a formula, for tuition and education costs paid as a parent or natural guardian for a student in a qualified non-public elementary or secondary school.

AFFIRMATIVE DEFENSE

I

That Minnesota Laws 1971, Chapter 944, does not violate any provisions of the constitution of the State of Minnesota or the constitution of the United States and is a valid law of the State of Minnesota in full force and effect.

WHEREFORE, Intervenor defendants, and each of them, pray the Court that plaintiffs' complaint be dismissed and that all relief requested therein be denied and that the Court enter its declaratory judgment declaring that Minnesota Laws 1971, Chapter 944, is not a violation of any provision of the Minnesota State Constitution or the United States Constitution and that it is a valid law of the State of Minnesota in full force and effect and that these intervenor defendants have their costs and disbursements herein.

MEIER, KENNEDY & QUINN
By /s/ TIMOTHY P. QUINN
Attorneys for Intervenor
Defendants
430 Minnesota Building
St. Paul, Minnesota 55101

(Title of Cause)

ANSWER OF DEFENDANT-INTERVENORS JAMES P. LARKIN, ET AL.

Intervenors for their answer to the complaint of plaintiffs herein state and alleges as follows:

I

Intervenor James P. Larkin resides at Route 1, 836 in the City of Excelsior, Minnesota, is employed as an attorney with Larking, Hoffman, Daly & Lindgren, Ltd., of Minneapolis, Minnesota, has paid and is paying income taxes, property taxes and sales taxes to the State of Minnesota or political subdivisions thereof and is the parent of twelve children, eight of whom attend a non-public elementary or secondary school meeting the qualifications of Minnesota Laws 1971, Chapter 944. That said intervenor James P. Larkin has paid tuition and educational costs for said children attending said non-public schools during the calendar year 1971 and meets the requirements necessary under Minnesota Laws 1971, Chapter 944, for him to claim a tax credit on his Minnesota Income Tax Return for the year 1971 as provided in said law.

II

Intervenor Harris Duininck resides at Prinsburg, Minnesota, is employed as a paving contractor with Duininck Bros. and Gilchrist Co., of Prinsburg, Minnesota, has paid and is paying income taxes, property taxes, and sales taxes to the State of Minnesota or political subdivision thereof, and is the parent of four children, three of whom attend a non-public elementary or secondary school meeting the qualifications of Minnesota Laws 1971, Chapter 944. That said intervenor Harris Duininck has paid tuition and education costs for said children attending said non-public schools during the calendar year

1971 and meets the requirements necessary under Minnesota Laws 1971, Chapter 944, for him to claim a tax credit on his Minnesota Income Tax Return for the year 1971, as provided by said law.

III

Intervenor Bert Van't Hul resides at Kenneth, Minnesota, and is self-employed as a realtor in Luverne, Minnesota, has paid and is paying income taxes, property taxes, and sales taxes to the State of Minnesota or political subdivisions thereof, and is the parent of four children, one of whom attends a non-public elementary or secondary school meeting the qualifications of Minnesota Laws 1971, Chapter 944. That said intervenor Bert Van't Hul has paid tuition and education costs for said child attending said non-public school during the calendar year 1971 and meets the requirements necessary under Minnesota Laws 1971, Chapter 944, for him to claim a tax credit on his Minnesota Income Tax Return for the year 1971, as provided by said law.

IV

Intervenor Albert F. Martin resides at 510 Mount Curve Boulevard in St. Paul, Minnesota is employed as a physical chemist by 3M Company in St. Paul, Minnesota, has paid and is paying income taxes, property taxes, and sales taxes to the State of Minnesota or political subdivisions thereof, and is the parent of three children, all of whom attend a non-public elementary or secondary school meeting the qualifications of Minnesota Laws 1971, Chapter 944. That said intervenor Albert F. Martin has paid tuition and education costs for said children attending said non-public schools during the calendar year 1971, Chapter 944, for him to claim a tax credit on his Minnesota Income Tax Return for the year 1971, as provided by said law.

V

Intervenor Robert George Zabel resides at 1210-11th Avenue N.E. in the City of Rochester, Minnesota, is employed as an area program director at Zumbro Valley Mutual Health Center, in Rochester, Minnesota, has paid and is paying income taxes, property taxes, and sales taxes to the State of Minnesota or political subdivisions thereof, and is the parent of seven children, all of whom attend a non-public elementary or secondary school meeting the qualifications of Minnesota Laws 1971, Chapter 944. That said intervenor Robert George Zabel has paid tuition and education costs for said children attending said non-public schools during the calendar year 1971 and meets the requirements necessary under Minnesota Laws 1971, Chapter 944, for him to claim a tax credit on his Minnesota Income Tax Return for the year 1971,as provided by said law.

VI

Intervenor Robert Ulrich resides at 4925 Thomas Avenue South in the City of Minneapolis, Minnesota, is employed as a salesman by Bemis Company, Inc., of Minneapolis, Minnesota, has paid and is paying income taxes, property taxes, and sales taxes to the State of Minnesota or political subdivision thereof, and is the parent of five children, four of whom attend a non-public elementary or secondary school meeting the qualifications of Minnesota Laws 1971, Chapter 944. That said intervenor Robert Ulrich has paid tuition and education costs for said children attending said non-public schools during the calendar year 1971 and meets the requirements necessary under Minnesota Laws 1971, Chapter 944, for him to claim a tax credit on his Minnesota Income Tax Return for the year 1971, as provided by said law.

VII

Each of the intervenors for many years has been and is now a resident of the State of Minnesota paying income taxes, property taxes, and sales taxes to the State of Minnesota or political subdivisions thereof, and each is a parent of children attending non-public schools meeting the requirements of Minnesota Laws 1971, Chapter 944, and each has paid tuition and education costs for said children during the calendar year 1971 so as to qualify for a tax credit on Minnesota Income Tax Returns for the calendar year 1971. That each of the intervenors will fairly and adequately protect the interests of the class of taxpayers who meet the requirements necessary to qualify for a tax credit pursuant to the provisions of said law, a class which is so numerous that joinder of all members is impractical; that all questions of law or fact are common to the class as a whole and the claims of the representative taxpayers are typical of the claims of the class as a whole. That the defense of the constitutionality of Minnesota Laws 1971, Chapter 944, by these intervenors in this class action will result in an adjudication with respect to the individual taxpayers entitled to a tax credit under said law which would, as a practical matter, be dispositive of the interest of all other taxpayers qualifying for a tax credit under said law who are not parties to this action, and such adjudiction will not substantially impair or impede their ability to protect the interests of all such taxpayers claiming such tax credit under said law in the State of Minnesota.

FIRST DEFENSE

I

The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

I

Intervenors deny each and every allegation, matter and thing contained in said complaint except as hereafter pleaded.

II

Intervenors admit that plaintiffs' action is instituted to obtain a declaratory judgment concerning the constitutionality of Minnesota Laws 1971, Chapter 944.

III

Intervenors specifically deny that plaintiffs meet the requirements necessary to maintain a class action herein on behalf of a class of all taxpayers in the State of Minnesota.

IV

Intervenors are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 20, 22 and 24 of plaintiffs' complaint and therefore deny the same.

V

Intervenors admit that the State of Minnesota is a sovereign state; that Arthur C. Roemer is Commissioner of Taxation for the State of Minnesota; that Gerome T. Caulfield is Coordinator, Income Tax Division, Department of Taxation, State of Minnesota; that Rolland F. Hatfield is Auditor of the State of Minnesota; that Howard B. Casmey is Commissioner of Education of the State Minnesota; and that Val Bjornson is Treasurer of the State of Minnesota.

VI

Intervenors admit that on June 7, 1971, the Governor of the State of Minnesota signed into law Minnesota Laws 1971, Chapter 944.

VII

Intervenors admit that Minnesota Laws 1971, Chapter 944, provides that a tax payer shall be given an income tax credit, based upon a formula, for tuition and education costs paid as a parent or natural guardian for a student in a qualified non-public elementary or secondary school.

AFFIRMATIVE DEFENSE

I

That Minnesota Laws 1971, Chapter 944, does not violate any provision of the constitution of the State of Minnesota or the constitution of the United States and is a valid law of the State of Minnesota in full force and effect.

WHEREFORE, intervenors, and each of them, pray the Court that plaintiffs' complaint be dismissed and that all relief requested therein be denied that the Court enter its declaratory judgment declaring that Minnesota Laws 1971, Chapter 944, is not in violation of any provision of the Minnesota State Constitution or the United States Constitution and that it is a valid law of the State of Minnesota in full force and effect and that these intervenors have their costs and disbursements herein.

/s/ DANIEL A. UTTER
Attorney for Intervenors
1421 Park Avenue South
Minneapolis, Minnesota 55404
336-7256

(Title of Cause)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

File Nos. 379526, 380252

This matter came duly on for trial before the undersigned on March 1, 1972. The plaintiffs in both actions were represented at trial by their attorneys Lynn S. Castner and William B. Korstad. In addition to these two attorneys there were numerous attorneys of record as associate counsel for the plaintiffs. The defendants, State of Minnesota and other state officers, were represented by John R. Kenefick, Deputy Attorney General, and Edwin P. Lee, Special Assistant Attorney General. The intervenors, Louis Quast and others, were represented by their attorney, Timothy P. Quinn. The intervenors, James P. Larkin and others, were represented by their attorneys, Daniel A. Utter and David W. Louisell.

After termination of the trial various counsel requested time to submit legal briefs to the Court. The Court granted said request and also requested trial counsel to submit to the Court proposed Findings of Fact. At request of counsel, oral argument was heard by the Court on June 2, 1972, at which time trial counsel made arguments to the Court. The Court has also received all the briefs of the respective trial counsel.

Based upon all the evidence adduced at said trial and upon all the files, records and proceedings herein, the Court makes the following findings:

FINDINGS OF FACT

1. These actions were commenced to obtain declaratory relief pursuant to Minn. Stat. 555.01 and injunctive relief concerning the validity and operation of Laws 1971, Chapter 944.

2. Various parties were dismissed and other disposition

made of defendants' pre-trial motions by Orders of this Court dated January 6, 1972 and February 1, 1972, as more fully appears in the files herein.

3. The two cases were consolidated by Order of this Court dated February 1, 1972.

4. By Order of this Court dated February 22, 1972, two separate groups of individual taxpayers were allowed to intervene as party defendants.

5. The jurisdiction of this Court is established by the standing of the individual plaintiffs who are taxpayers and residents of the State of Minnesota; the State of Minnesota and various governmental officials who were named as defendants.

6. Certain individual plaintiffs alleged that they constituted class representations, but failed to prove this status by appropriate proceedings pursuant to Rule 23.03. The Court finds the action was not properly maintained as a class action by any plaintiff.

7. The purpose of Laws 1971, Chapter 944, is to provide partial tax relief to parents and legal guardians of nonpublic school children who, at their own expense, are providing a secular education for their children, thus relieving the state of an obligation it would otherwise be fully obligated to perform.

8. Laws 1971, Chapter 944 (now codified as Minn. Stats. 290.86 and 290.87), provides for an income tax credit on the individual income tax returns of parents or legal guardians of children in kindergarten, elementary and secondary nonpublic schools located in Minnesota.

9. The credit is not available to parents or legal guardians who are non-residents of Minnesota for the entire calendar year.

10. The tax credit claim may be filed only by the parents or legal guardians who previously paid the nonpublic school education cost or presents proof of payment.

11. If the allowable credit exceeds the state income taxes due on the claimant's income, and there is no past liability to which the credit may be applied, the amount of the credit shall be paid to the claimant the same as a refund for overpayment.

12. The total tax credit is based on 10 months of each calendar year, during which the child is enrolled in a nonpublic school.

13. There is a provision in the Minnesota Income Tax Act whereby a taxpayer may deduct from gross income in an amount not to exceed $200.00 for each dependent, the amount he has paid to others for tuition of such dependent, and transportation costs in attending an elementary or secondary school. Minn. Stat. 290.09 (22). Said provision has been in effect since 1955. Laws 1955, Chapter 741, Sec. 1.

14. The taxpayer must elect to avail himself of the deduction provision as found in 290.09 (22), or the credit provision as found in Chapter 944. The taxpayer may not receive the benefit of both statutes.

15. For the taxpayer to be entitled to the credit, his child or ward must attend a "nonpublic school" which is defined as an elementary or secondary school, other than a public school, located in Minnesota, wherein a resident of Minnesota may fulfill the state's compulsory attendance laws, is not operated for profit, and adheres to the provisions of the Civil Rights Act of 1964.

16. The Department of Taxation has not promulgated any regulations to implement Chapter 944.

17. There are three tax forms disseminated by the Department of Taxation for the orderly administration of Chapter 944, Form NSRC-1, Form NSRC, and Schedule NSC.

18. The nonpublic school first determines its maintenance, adjusted maintenance, and restricted maintenance cost figures for all its students on Form NSRC-1, and calculates the maximum allowable credit per pupil for each month of enrollment.

19. The school then fills out Form NSRC for each student, indicating the maximum allowable tax credit per pupil for each month of enrollment, multiplied by the number of months that the student was enrolled. This form is sent to the claimant-taxpayer.

20. The claimant-taxpayer must fill out Schedule NSC which determines the credit which is allowed on his income tax return.

21. Both Form NSRC and Schedule NSC are attached to the individual income tax return as proof of the credit.

22. The Form NSRC meets the requirements of the receipt and certification specified by Chapter 944, Sec. 1, Subd. 7.

23. The Schedule NSC is a summary form essentially for the assistance for the claimant-taxpayer and the convenience of the Department of Taxation.

24. The Form NSRC-1 is a back-up form to NSRC to allow the schools to determine their maintenance, adjusted maintenance, and restricted maintenance costs uniformally for all their students.

25. The Form NSRC-1 is also sent to the Department of Taxation for review of the maintenance cost figures.

26. The amount of the credit for calendar years 1971 and 1972 is the less of the following three amounts:

(a) $50.00 for a kindergarten student, $100.00 for an elementary school student, and $140.00 for a secondary school student, limited by the number of months the child is enrolled,

(b) the amount paid by the parents for education cost, or

(c) the restricted maintenance cost per pupil unit in average daily attendance, multiplied by the percentage of average public school state foundation aid, limited to the number of months the child was enrolled.

27. For the calendar year 1973 and thereafter the credit can change. The maximum credit for 1973 will be the less of:

(a) the average public school state foundation aid per pupil unit for 1973, divided by the same figure for 1972, multiplied by $50.00 for a kindergarten student, $100.00 for an elementary school student, and $140.00 for a secondary school student, limited by the number of months the child is enrolled,

(b) the amount paid by the parents for education costs, or

(c) the restricted maintenance cost per pupil unit in average daily attendance multiplied by the average public school state foundation aid, limited to the number of months the child was enrolled.

28. The average public school state foundation aid percentage is determined by the Department of Education on or before October 1 of each year. This figure is the percentage of the average state foundation aid per pupil unit in average daily attendance for Minnesota public elementary and secondary schools in relation to the average state and local main-

tenance cost per pupil unit in average daily attendance in the said public schools for the school year completed during the calendar year in which the tax credit is claimed.

29. The purpose and effect of limiting restricted maintenance costs by the average daily foundation aid percentage is to make the benefit which the nonpublic school parents derive from the tax credit proportional to the benefit which parents of public school students derive from the state aid policies whereby the state pays part of the maintenance costs of the public schools.

30. In computing the amount paid by the claimant-taxpayer for education costs, the term "education cost" includes tuition, classroom instruction fees and textbooks.

31. The term "textbooks" as used in the Act means only those same textbooks as are used in the public schools, and does not include texts or materials used in the teaching of religious tenets, doctrines or worship.

32. In computing the maximum tax "education costs" paid by the claimant, the purchase of religious textbooks is excluded.

33. In determining the "maintenance costs" of the nonpublic school on Form NSRC-1, the term "maintenance cost" has the meaning intended and applied in public elementary and secondary schools.

34. Maintenance costs calculated on Form NSRC-1 are determined in the same manner and according to the same standards in both the public and nonpublic elementary and secondary schools.

35. The purchase of religious texts and books, such as Bibles, are included in computing maintenance costs for the public schools.

36. Because maintenance cost has the same meaning in nonpublic schools, the purchase of religious texts and books are also included in computing maintenance costs for the nonpublic schools.

37. In computing the maximum allowable tax credit, maintenance cost in the nonpublic school is in all cases reduced by 20% and is designated as the "restricted maintenance cost".

38. The Legislature intended to pass a constitutional statute in enacting Chapter 944.

39. The Legislature concluded it could not constitutionally provide a tax credit to parents for that portion of their children's nonpublic education which is sectarian.

40. The Legislature concluded it could constitutionally provide a tax credit for parents for that portion of their children's nonpublic education which is secular.

41. The concept of "restricted maintenance cost" in the formula embodies the legislative determination that secular nonpublic education can be separated from the sectarian resulting in a tax credit applicable only to the secular.

42. The "restricted maintenance cost" formula is a legislative finding that at least 80% of the education provided by nonpublic elementary and secondary schools is secular and is substantially equivalent to the education provided in public schools.

43. At various times during the legislative session, other formulas for allocating the secular and sectarian were fully considered by the Legislature.

44. Minnesota has a compulsory attendance statute which requires children between the ages of seven and 17 to attend a public school or a private school, for not less than nine months per year. Minn. Stat. 120.10.

45. The responsibilities for compliance with the compulsory attendance law rests upon the parent or guardian of the child. Minn. Stat. 120.12.

46. The parent or legal guardian is able to satisfy the compulsory attendance law by sending the child to a nonpublic school taught by teachers whose qualifications are essentially equivalent to public school teachers, and where essentially equivalent secular subjects are taught. Minn. Stat. 120.10, Subd. 2.

47. The County Superintendent of Schools has the responsibility of judging the standards of the nonpublic schools in his county, and causing criminal proceedings to be brought against the parents if the child does not attend a qualified school. Minn. Stat. 120.12.

48. The plaintiffs did not prove, or attempt to prove, that any nonpublic elementary or secondary school in Minnesota fails to meet compulsory attendance standards.

49. Evidence was presented at the trial by the plaintiffs concerning the critical thinking of Catholic students. Evidence was mainly from one witness who was a University Education Professor. While such evidence was interesting from an educator's standpoint, the Court finds it completely irrelevant to the issues at hand. This is because there is no evidence indicating that the nonpublic schools failed to comply with the compulsory education laws.

50. Absent any affirmative evidence to the contrary, the Court finds that all nonpublic elementary and secondary schools in Minnesota meet the minimum standards, and parents are able to satisfy the compulsory attendance laws by sending their children to said nonpublic schools.

51. Since the said nonpublic schools meet the minimum standards of Minn. Stat. 120.10, established by the Legisla-

ture, the secular education they provide is substantially equivalent to that of the public schools.

52. Since the secular education provided in the public and nonpublic schools is substantially equivalent, it was reasonable for the Legislature to allocate at least 80% of the adjusted maintenance cost to the secular education provided.

53. The "restricted maintenance cost" formula of 80%-20% is reasonable both on its face and as applied.

54. The plaintiffs have failed to show that the cost of the sectarian education provided by any nonpublic school exceeds 20% of total adjusted maintenance cost.

55. The plaintiffs have failed to show that the cost of the secular education provided by any nonpublic school, or any particular school, is less than 80% of the total adjusted maintenance cost.

56. Plaintiffs have failed to show by any measurement that the 80%-20% relationship between secular and sectarian education in any nonpublic school is incorrect.

57. The adjusted maintenance cost per pupil unit in average daily attendance for the City of Minneapolis for the year ending June 30, 1970 (graded elementary and secondary public schools) was $715.00.

58. The adjusted maintenance cost per pupil unit in average daily attendance for the City of Saint Paul for the year ending June 30, 1970 (graded elementary and secondary public schools) was $671.00.

59. The average nonpublic school adjusted maintenance cost per pupil unit in average daily attendance for the school year 1970-71 in the Saint Paul-Minneapolis area for elementary schools was $331.06.

60. The average nonpublic school adjusted maintenance costs per pupil unit in average daily attendance for the school year 1970-71 in the Saint Paul-Minneapolis area for secondary schools was $435.46.

61. The weighted average adjusted maintenance cost per pupil unit in average daily attendance for all public schools for the years ending June 30, 1969, 1970 and 1971 was $561.00, $626.00 and $731.00 respectively.

62. The average nonpublic school adjusted maintenance cost per pupil unit in average daily attendance for the school year 1970-71 for elementary schools outside the Saint Paul-Minneapolis area was $285.77.

63. The average nonpublic school adjusted maintenance costs per pupil unit in average daily attendance for the school year 1970-71 for secondary schools outside the Saint Paul-Minneapolis area was $336.39.

64. The Minnesota Legislature has the obligation to educate all children in the State of Minnesota. Minnesota Constitution, Art. VIII, Sec. 1, Sec. 2.

65. The Minnesota Legislature has the duty to fulfill its obligation to educate all children at the minimum expense to the taxpayers.

66. The adjusted maintenance cost figures for nonpublic schools are substantially lower than comparable figures for the public schools.

67. The State Legislature is effecting substantial monetary savings by partially reimbursing parents of nonpublic school children, because the cost of educating the children in the public schools would be substantially greater.

68. The tax relief provided by Chapter 944 is afforded to the parents only and not to the nonpublic schools.

69. There is no payment of any moneys between the State of Minnesota and any nonpublic school, pursuant to Chapter 944.

70. The Catholic parishes in the State of Minnesota are separate corporate entities.

71. Each Catholic parish in the State of Minnesota determines and makes its decisions on financial matters of the parish.

72. The Catholic parishes in the State of Minnesota are supported wholly by contributions, most of which emanate from their own parishioners.

73. If a Catholic parish maintains a school, the parish sets and collects the school tuition. The cost of operating the school which is not covered by such tuition is covered by a subsidy from the general funds of the parish.

74. Some of the Catholic parishes have Parish Councils, and some other parishes have Parish Boards of Education, and some have Regional Boards of Education covering more than one parish. Practically all the personnel on these boards and councils are of the religion of the faith.

75. Teachers in Minnesota nonpublic schools have no statutory protection in tenure or dismissal as provided for teachers in public schools.

76. The general trend in Catholic parishes throughout the country which maintain schools is to place decreasing reliance upon the parish subsidy and increasing reliance on tuition.

77. The primary reason for this trend is the conviction that the parents of the children who attend the parish school should maintain the parish school.

78. The operating budgets of parishes maintaining schools in the last two years have remained relatively stable, rising only due to normal inflationary factors.

79. The tuition levels in these schools in the last two years have generally risen.

80. Some schools raised their tuition prior to the passage of Chapter 944 and others raised their tuition after enactment of said law.

81. Any raises in tuition, whether before or after the passage of Chapter 944, have not resulted in any net benefit to the nonpublic schools because their operating budgets have remained approximately the same.

82. For many years prior to and since passage of Chapter 944, some nonpublic schools have arranged for tuition loan plans at local banks, allowing parents to pay the entire tuition early in the year, when needed most by the schools. After passage of Chapter 944 greater use of said loan plans were made by the nonpublic schools.

83. The tenets or doctrines of particular faiths are taught in religion classes in those nonpublic schools which are affiliated with those faiths.

84. Plaintiffs have failed to show that any allocation of either time or expense to the religious education provided by any nonpublic school exceeds 20%.

85. Nonpublic schools use the same secular textbooks as are generally used in the public schools.

86. Textbook companies no longer publish separate editions of texts used in secular subjects in public or nonpublic schools.

87. Plaintiffs have failed to show any inclination of religious beliefs into the teaching of secular subjects in nonpublic schools.

88. Various groups and organizations supported and various groups and organizations opposed the passage of Chapter 944.

89. Some religiously affiliated nonpublic schools opposed the passage of Chapter 944.

90. Some religiously affiliated nonpublic schools have not provided the maintenance cost figures to support the claim of the tax credit by parents of children attending those schools.

91. Some totally secular groups and organizations supported the passage of Chapter 944, such as the Minnesota Chapter of the Americans For Democratic Action.

92. Evidence was presented at trial that lobbying activities were engaged in before enactment of Chapter 944. No evidence, however, was presented to indicate that such lobbying differed in any degree from any other major issue before the Legislature.

93. Both gubernatorial candidates in the 1970 election supported the passage of Chapter 944.

94. Some members of the Catholic Church opposed the passage of Chapter 944, and some supported the passage of Chapter 944.

95. Plaintiffs failed to prove divisiveness of the community along denominational lines concerning the policy of Chapter 944 prior to its passage.

96. Plaintiffs have failed to show any divisiveness of the community along denominational lines concerning Chapter 944 subsequent to its passage.

97. Any divisiveness in the community which is present due to the passage of Chapter 944 is premised on ideological differences rather than on denominational differences.

98. Chapter 944 contains self-adjusting provisions whereby the tax credit will be increased or decreased in accordance

with either legislative changes in the percentage of state foundation aids to public schools, or inflationary trends.

99. Due to the self-adjusting aspect of Chapter 944, the Court finds no necessity for the supporters of Chapter 944 to return to the Legislature for increases in the maximum allowable credit.

100. Meetings occurred both prior and subsequent to the passage of Chapter 944 between members of the Department of Taxation and persons who supported Chapter 944.

101. The purpose of these meetings was for the Department of Taxation to obtain necessary information to implement Chapter 944 in a feasible and efficient manner.

102. Similar meetings for similar purposes occurred both prior and subsequent to the passage of other taxing statutes, such as the senior citizens' income tax credit.

103. Chapter 944 has been administered by the Department of Taxation no differently than any other taxing statutes.

104. The Commissioner of Taxation has extensive powers to examine books and records by virtue of Minn. Stat. 270.06, Subds. 7 and 8, and Minn. Stat. 290.56, Subd. 1.

105. Chapter 944 does not in any way expand or constrict audit or examination powers otherwise given to the Commissioner of Taxation.

106. The Commissioner of Taxation has the authority to audit the books and records of a claimant to determine if he has fully paid the amount of education costs claimed.

107. The Commissioner of Taxation has the authority to examine the books and records of a nonpublic school pursuant to audit of an individual's income tax return in at least three situations:

(a) a deductible contribution claimed by the taxpayer,

(b) a deduction pursuant to 290.09 (22) claimed by the taxpayer, or

(c) a tax credit pursuant to Chapter 944.

108. Any examination of the books and records of a nonpublic school which might occur would be restricted to cost and disbursement figures to verify the credit claimed on the individual income tax return of claimant-taxpayer.

109. Any examination which might occur would be the same with regard to a religiously affiliated nonpublic school as a nonreligiously affiliated nonpublic school.

110. No audit nor surveillance need be accomplished as to what is secular and what is sectarian in those nonpublic schools which are religiously affiliated.

111. Any possible examination of the books and records of a nonpublic school appears unlikely for a number of reasons:

(a) the taxpayer-claimants' returns are all subjected to a "machine audit" to correct arithmetic errors,

(b) many of the taxpayer-claimants' returns are also subjected to "occupational audits", "spot checks", or "educational audits",

(c) the Form NSRC-1 is subjected to an initial review by the Department of Taxation and any gross errors are corrected there,

(d) there are a number of built-in audit procedures in the forms and relationships between the parties,

(e) some of the items on Form NSRC-1 can be independently verified, such as receipt of federal moneys and salaries (by the withholding records on file),

(f) in order to make the difference of $1.00 on a claimant's tax return, the maintenance cost reported must con-

tain an error of at least 1% assuming that the credit is at the statutory maximum.

112. Any administrative relationships previously in existence between other state agencies or departments and nonpublic schools are in no way increased or enhanced by Chapter 944.

113. No nonpublic schools have in any way entered into any permanent, binding or complex entangling relationships with the state, any of its officials, or any of its departments.

114. The plaintiffs' allegations of denial of due process are in no way relevant to Chapter 944, and if relevant, have not been established by the evidence.

115. The plaintiffs' allegations of denial of equal protection are in no way relevant to Chapter 944, and if relevant, have not been established by the evidence.

116. Plaintiffs have failed to show, as alleged in the complaint, that Chapter 944 tends to promote or perpetuate any racial or socio-economic segregation in nonpublic schools.

117. There is no evidence of exclusion, or any policy of exclusion, by nonpublic schools of minority children.

118. For reasons unknown to the Court, the plaintiffs did not introduce any evidence concerning the operation, function, purpose, or policies of churches other than the Catholic churches which maintain nonpublic schools in Minnesota, namely:

(a) The Episcopal Diocese of Minnesota;

(b) The Evangelical Covenant Church of America;

(c) The Minnesota Conference Association of Seventh Day Adventists, Inc.;

(d) The Twin City Lutheran High School Association, Inc.;

(e) The Torah Academy; and

(f) The Minnesota Christian Reformed Churches, even though such churches maintain 137 nonpublic schools in Minnesota.

119. The plaintiffs also did not introduce any evidence concerning the operation, function, purpose, or policies of any nonpublic school in Minnesota which has no religious affiliation, even though there are 25 such schools in Minnesota.

120. Evidence was received at trial projecting that in a few years there will be empty classrooms in the State of Minnesota due to the declining school-age population. Assuming said projection to be true, it is nevertheless immaterial to the issues of this trial.

121. In Minnesota for the school year 1970-71, there were 937,476 pupils enrolled in public elementary and secondary schools. Approximately 66% of the nonpublic schools are Catholic.

122. Religion is taught in the religiously affiliated nonpublic schools in the state and in most of these schools there is religious symbolism in the buildings and in the classrooms by way of statuary, art and other symbols.

123. The editor of the official church newspaper for the Saint Paul-Minneapolis Archdiocese testified that his newspaper was distributed throughout the state and that during the legislative session the newspaper was sent to each member of the Legislature; and the editor also testified that said newspaper published legislative vote score cards indicating the votes of legislators on various issues in the previous session.

124. Chapter 3, Laws of 1877, proposed to the electorate a constitutional amendment. At the gubernatorial election of 1877 said proposed amendment received 36,780 "yes" votes

and 16,667 "no" votes. A total of 98,614 votes were cast at the same election for the gubernatorial candidates.

125. Chapter 3, Laws 1877, stated that "if it shall appear therefrom that a majority of voters present and voting at such election shall have ratified such amendment", then said proposed amendment shall be a part of the Constitution.

126. In 1878, the Legislature, meeting as the State Canvassing Board, determined that Chapter 3, Laws of 1877, was duly passed by the electorate and was a part of the Constitution and the Governor subsequently so declared by proclamation.

CONCLUSIONS OF LAW

1. Chapter 3, Laws of 1877, was duly ratified by the voters in the election on November 6, 1877. Said amendment became Article VIII, Sec. 3 of our Constitution but was renumbered Sec. 2 by the voters in 1961.

2. Laws 1971, Chapter 944, is constitutional in all aspects, under both state and federal constitutions.

3. Plaintiffs are not entitled to an injunction.

4. There is herewith attached a Memorandum of Law which is made a part of this Order.

ORDER FOR JUDGMENT

Therefore, let judgment be entered declaring that Laws 1971, Chapter 944, is constitutionally valid in all respects.

Dated: This 6th day of July, 1972.

/s/ J. JEROME PLUNKETT
Judge of District Court

MEMORANDUM OF LAW

I

At the trial, the intervenors raised questions as to whether or not Article VIII, Sec. 2 of the Minnesota Constitution was validly ratified by the voters in the election on November 6, 1877. The Court feels that this issue should be disposed of first.

It appears that the proposed amendment by Chapter 3, Laws of 1877, received more "yes" votes than "no" votes. The Legislature, sitting as the State Canvassing Board, declared the amendment passed and the Governor subsequently so declared by proclamation.

In 1877, the constitutional provision for amending provided;

> ". . . and if it shall appear in a manner to be provided by law, that a majority of voters present and voting shall have ratified such alteration or amendments, the same shall be valid to all intents and purposes as a part of this Constitutiton.". Article XIV, Sec. 1.

It appears that the Constitution in 1877 required only a majority of voters voting on the amendment to ratify a proposal. Later in 1898, the Constitution was amended to require a majority of all persons voting at such an election. The problem arises in this case because the Legislature in enacting Chapter 3, Laws of 1877, seemingly required ratification to require a majority of voters at the election not the majority of persons voting for the amendment.

The legal question before the Court is the proposition of whether the Legislature could require a different standard of passage than provided by then Article XIV, Sec. 1 (the amending process).

The fact that for nearly 100 years everyone has believed the amendment to be a part of the Constitution has great

weight, but such a fact alone is not conclusive. The fact that the Legislature, sitting as a State Canvassing Board in 1878, declared the amendment passed, is also of great weight, but once again is not conclusive.

The Court feels, however, that the Legislature in 1877, could not legally require a different or higher plurality for this amendment than that then required in the Constitution. In 1876 our Supreme Court interpreted the Constitution in Dayton v. St. Paul, 22 Minn. 400, to require only a majority of voters voting on the amendment. This Court, therefore, has ruled that Chapter 3, Laws of 1877, was validly ratified by the voters, and such amendment is now Article VIII, Sec. 2 of our Constitution.

II

Before considering the legal aspects of this lawsuit, the Court would like to discuss some of the issues of fact and the Court's findings thereon. It seems to me that the extended trial of this case produced almost nothing novel that could not have been stipulated to before trial.

The only relevant issue in this trial was whether Chapter 944 was a valid law. A great deal of testimony was introduced concerning efforts to secure passage of the bill. There is no dispute that private schools, including religiously oriented schools, have been having difficult financial problems in recent years, and that the problem is accelerating. Parents of children attending private schools were in need of financial assistance. Chapter 944 was enacted as a constitutional attempt by the Legislature to alleviate some of the problems.

Testimony at trial attempted to show lobbying activities both for and against Chapter 944. The plaintiffs apparently thought that such testimony was desirable to show a divisive-

ness of the community, however, the testimony only showed customary lobbying activities and no divisiveness.

Extended testimony was introduced showing implementation of the bill by the Department of Taxation after passage of the bill. Again such testimony was nothing unusual nor nefarious, but only showed the attempt of the Department of Taxation to implement the bill as quickly and clearly as possible. The fact that proponents of the bill were contacted by the Department of Taxation was logical and not illegal. Heads of Catholic schools and other schools affected by Chapter 944 conducted programs and seminars to explain the bill and its mechanics. Such activities are not only logical but imperative. Trade associations, labor organizations, local government bodies, Judges' associations and others customarily conduct such activities when new laws are passed affecting their particular area of conduct. Trial Plaintiffs' Exhibit No. 7 is an instruction booklet adopted by the Department of Taxation. Said booklet shows how Chapter 944 is to be implemented.

A great deal of evidence was received at trial concerning the financial status of most of the Catholic schools in the Twin City area. The documentary evidence showed a comparison of school budgets for the years 1970-71 and 1971-72. The evidence indicates that most of the elementary school budgets relied heavily on a parish subsidy for income while secondary schools mostly relied on tuition for income. After passage of Chapter 944, many, but not all, of the schools raised their tuition. In each instance, however, the parish subsidy decreased almost in proportion to the raise in the tuition; the only increase in total school budgets were normal operating increases due to inflation. It appears that the schools received nothing more, but the only real gainers were the parents. In

almost all instances the parish subsidy consisted of free will offerings by members, whose contributions were deductible under both the federal and state income tax laws. Chapter 944 therefore did not directly help the schools but did help the parents with tuition costs, which was the purpose of the law.

The plaintiffs offered as a witness a University Professor whose expertise was education. Said witness testified extensively about public education and education in Catholic schools. Numerous educational studies were advanced to establish that Catholic students lacked critical thinking. The weight of said testimony was somewhat diminished by the statement of the Deputy Attorney General at oral arguments on June 2, 1972. The Deputy Attorney General indicated that his perusal of the studies quoted by the witness showed the studies to be of Catholics and Jews, and also that no comparison was made of Catholic school education versus public school education. Such a dispute, however, is purely academic because no evidence was introduced to show that Catholic schools or any nonpublic schools failed to comply with the Minnesota compulsory attendance laws. (See Findings 44 through 52.) The Court, therefore, feels that said testimony was completely irrelevant to the issues at hand.

At the trial, the plaintiffs introduced much testimony about the Catholic Church. It is true that the majority of nonpublic schools in Minnesota are Catholic, but, nevertheless, nothing was introduced about other religiously oriented schools or private schools. It is admitted that a Catholic priest is obedient to his superior the Bishop, and that the Bishop is appointed by a foreigner. Such a fact is historically correct and has been a claim for many years in this country. The political and social impact of such a fact, however, has been demolished by the

presidential election in 1960. The fact also is of no judicial significance.

Along the same line evidence was presented concerning the religious character of Catholic schools. It is admitted that Catholic and other religiously oriented nonpublic schools teach religion therein. No one denies this, but the plaintiffs failed to show what percentage or how much time is so involved. The Legislature determined that the secular aspect in nonpublic schools was at least 80% and that the sectarian aspect was no more than 20%. No testimony whatsoever disputed or contested such a legislative conclusion. A Court should and must not disturb such a conclusion.

Testimony, mainly by way of photographs, was presented showing that Catholic schools have crucifixes in and on the buildings, in the hallways and in the classrooms. Also that religious art, such as statutary, adorn such buildings within and without. Apparently such testimony was a predicate for the educational expert witness to make his conclusions. If done for this reason such testimony was perhaps relevant. However, if such testimony is offered to the validity of Chapter 944, the Court finds no connection therewith.

The greatest number of findings by the Court relate to details of Chapter 944 and how it operates. Findings are made as to how the parent of nonpublic school children can receive the tax credit provided. Also findings are made as to the exact administration of the bill by the Department of Taxation and how legislative language is interpreted by the Executive Branch. Such detailed findings are necessary before the Court can make a valid conclusion as to the constitutional validity of the law.

Many other areas were covered by the evidence at the trial. The Court will not attempt to treat each specific area by comment, except as noted above or as may be concluded from the Findings of Fact.

III

This last section of the Court's Memorandum deals with the very heart of the problem. Is Chapter 944, as enacted and implemented, valid in the face of constitutional objections? Striped of all its verbiage and legalistic language what does Chapter 944 say? The Legislature has told parents that if they send their child to a nonpublic school, which meets compulsory attendance laws, that the state will reimburse the parents for tuition paid at such schools, with certain dollar limits and also a limit by a formula devised by the Legislature. The reimbursement is by way of a tax credit on the parents' income tax return. Is such a legislature scheme valid constitutionally?

UNITED STATES CONSTITUTION

The relevant portions of the First Amendment to the United States Constitution reads:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;".

This clause was made applicable to the states by the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296 (1943).

The entire problem of interpreting these two clauses is aptly stated by Chief Justice Burger in Walz v. Tax Commission, 397 U.S. 664 (1970).

> "The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute pro-

hibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.

"The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.

* * *

"The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

"Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are

intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.

"Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs amici, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right. No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement." 397 U.S. at 668-670.

The earliest United States decision in this area is Everson v. Board of Education, 330 U.S. 1 (1947). In this case the Court upheld a New Jersey statute which reimbursed the parents of school children for transportation costs to parochial schools. This case held that direct aid to schools is not permissible but that such indirect aid to a parent by way of reimbursement was valid.

In Board of Education v. Allen, 392 U.S. 236 (1968), the Court upheld a New York statute authorizing a school district to provide textbooks of a secular nature to all children in the school district, whether in public, private or parochial schools. This decision again allowed for indirect aid by way of diminishing the cost to parents to textbooks in nonpublic schools.

The most recent case in the area is Lemon v. Kurtzman, 403 U.S. 602 (1971). This case invalidates the statutes of Pennsylvania and Rhode Island that subsidized the salaries of teachers in parochial schools. The statutes provided for payments to the schools directly and that the teachers could only teach secular subjects. On the same day as Lemon, the United States Supreme Court decided Tilton v. Richardson, 403 U.S. 672 (1971). In Tilton, the Court upheld a federal statute that provided for direct grants to church affiliated colleges to construct buildings on their campuses if the buildings are used solely for secular purposes.

The Lemon case formulated three tests of constitutional interpretation. First, the statute must have a secular legislative purpose; second, the principal or primary effect of the statute must be one that neither advances nor inhibits religion; and third, the statute must not foster an excessive government entanglement with religion. The first two tests originated in Abington School Dist. v. Schempp, 374 U.S. 203 (1963). The third test originated in Walz v. Tax Commission, supra, and was further amplified in Lemon v. Kurtzman, supra.

a) Secular Purpose Test

Chapter 944 has no stated purpose within the statute itself or its preamble. An examination of the statute clearly shows the purpose to be a partial tax relief to parents of nonpublic school children who, at their own expense, are providing a secular education and thus relieving the state of an obligation it would otherwise be fully obligated to perform.

In Lemon v. Kurtzman, supra, the Court found secular intent present even though the Pennsylvania and Rhode Island statutes provided for direct compensation to the teachers in parochial schools. In Minnesota the Legislature, instead of

penalizing parents for exercising their constitutional right to send their children to nonpublic schools, Pierce v. Society of Sisters, 268 U.S. 510 (1925), gives the parents partial tax relief for the secular education they provide. This is the obvious intent of Chapter 944 and the purpose is obviously secular.

b) Primary Effect Test

The problem involved in determining the primary effect of a statute is correctly stated by Chief Justice Burger in Tilton v. Richardson, supra:

> ". . . the crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."

The difficulty in applying the principal effect test is that there may be two effects of a statute, one of which is secular and one which some might infer to be sectarian. The dilemma is posed in McGowan v. Maryland, 366 U.S. 420 (1961), where the secular purpose of the Maryland Sunday closing laws was to compel cessation of business activities on one day of the week, but the sectarian effect was to assist those religions that used Sunday as a day of worship. The Court in McGowan determined that the legislative determination of a secular purpose outweighed the sectarian effect in absence of a showing to the contrary.

In the case before the bar, the plaintiffs have failed to make any showing that the primary purpose or effect of Chapter 944 was sectarian. The most that can be said is that Chapter 944 will help parents keep their children in nonpublic schools by giving the parent a tax credit. The effect might be to keep

nonpublic schools open. The serious constitutional problem would seem to be not whether Chapter 944 advances religion, but whether denial to children of financial assistance for secular education just because their consciences cause them to go to schools that also teach religion, would unconstitutionally inhibit religion and therefore violate the Free Exercise Clause. See Pierce v. Society of Sisters, supra, and Wisconsin v. Yoder, —— U.S. ——, 92 S.Ct. 1526 (1972).

The plaintiffs contend that religion so permeates the secular education provided in primary and secondary schools that their religious and secular aspects are in fact inseparable. In Tilton the Supreme Court found that in higher education that such a fact did not necessarily exist. Chief Justice Burger in Tilton in analyzing the Allen case said:

> "It was also considered by this Court in Allen. There the Court refused to assume that religiosity in parochial elementary and secondary schools necessarily permeates the secular education that they provide.".

It also should be noted that in Lemon the Court made no conclusion that the Pennsylvania and Rhode Island statutes had a primary sectarian effect even though the aid was direct to the schools. The invalidity of the two states laws was expressly based on the entanglement test. This Court, therefore, determines that the primary effect of Chapter 944 is secular.

c) The Entanglement Test

The entanglement test is a relatively new condition first announced in Walz and later fortified in Lemon. The Court in Lemon described the judicial problem:

> "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall', is a

blurred, indistinct and variable barrier depending upon all the circumstances of a particular relationship."

The entanglements found in Lemon were many. The Pennsylvania statute provided for payment directly to the schools and required the schools to maintain precise accounting procedures that identified the separate cost of the secular education. The Rhode Island statute provided for payments directly to the teachers and directed the State Commissioner of Education to require eligible schools to submit financial data which must be examined in order to assess how much of the expenditure was for secular education and how much was for religious activity. Rhode Island further required teachers not to teach a course in religion. Another evil noted was the need for continuing appropriations to carry on the acts with resulting possibilities of political conflict along religious lines in securing the appropriations.

How does Chapter 944 fit into these prohibited entanglements? First of all, the aid is to the parents by way of a tax credit not a subsidy to a teacher nor a direct payment to a school. The Pennsylvania statute in Lemon is distinctly criticized on this point, and aid to the parents or students as in Everson or Allen is clearly distinguished. Chapter 944 has a formula which uses data applicable to the public schools, or data determined in the same way as for public schools. No inquiry is required by the state to determine how much teaching is secular or sectarian. Any state inquiry directed to a taxpayer or to a nonpublic school, to determine good faith in reporting data, would not differ in scope from inquiries of taxpayers or churches in enforcement of the federal and state income tax laws. No contacts or involvement have been shown to exist between the state and the nonpublic schools that did

not exist in administering the income tax laws prior to Chapter 944. If entanglement is involved it was not proved by the plaintiffs. The plaintiffs contend that the Department of Taxation would of necessity become entwined with the nonpublic schools in order to administer the law. The testimony before the Court did not indicate any continuing involvement between the state and schools other than normal auditing of tax returns as before Chapter 944.

Another evil mentioned in Lemon is the need for annual or continuing appropriations and the divisiveness inherent therein. Chapter 944 requires no annual or recurring appropriations. Its formula provides for modest adjustments based on inflation and the percentage of state aid to local public school districts. Application of the adjustments require no government contact with the nonpublic schools but only the calculation of state aid to local schools.

From all of the above this Court concludes that no illegal entanglement is involved with Chapter 944.

The plaintiffs also contend that Chapter 944 is violative of the Due Process Clause of the Fourteenth Amendment. While pleaded and argued briefly, this Court can only say that the Due Process Clause if anything requires that Chapter 944 be held valid. The trial counsel for one group of intervenors at oral arguments made a cogent comment thereon. In effect the argument is that the state owes a duty to educate children. If a parent assumes this cost to the benefit of the state, the state probably has a duty under the Due Process Clause to reimburse the parent. Since the state cannot be sued for unjust enrichment because of sovereign immunity, maybe Chapter 944 is a partial reimbursement to the parent by a tax credit.

Plaintiffs also allege that Chapter 944 violates the Federal Civil Rights Act. Chapter 944 is a taxing statute and the record is devoid of any evidence or argument to sustain such a contention.

As a final legal contention complaint is made that Chapter 944 violates the Equal Protection Clause of the Fourteenth Amendment. Once again the Court finds no evidence in the record nor legal precedents to sustain such a contention.

MINNESOTA CONSTITUTION

It is contended that Chapter 944 violates Article I, Sec. 16 and Article VIII, Sec. 2 of the Minnesota Constitution. The first Article is an expanded version of the First Amendment to the United States Constitution, with an addition that:

> ". . . nor shall any money be drawn from the Treasury for the benefit of any religious societies, or religious theological seminaries.".

The second Article is the so-called "Blaine Amendment" which provides:

> ". . . in no case shall the monies derived as aforesaid, or any portion thereof, or any public monies or property, be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.".

Both of these two Articles clearly prohibit direct payment to religiously oriented schools. Chapter 944, however, provides for payment to the parents not the schools.

The only Minnesota case interpreting these two Articles is Americans United v. Ind. School Dist., 288 Minn. 196 (1970). This case involves the validity of a law enacted in 1969

providing for the transportation of children to nonpublic schools. This opinion discusses at great length all the federal cases on the problem. The decision clearly turns on the First Amendment to the United States Constitution. After examination of the Establishment Clause and the Free Exercise Clause of the First Amendment and the cases interpreting such, the Minnesota Supreme Court held the legislation to be valid. There is dicta in the case indicating the other subsidies may be invalid, but such dicta reserves the right to decide each issue in the future in an adversary manner. Since the Minnesota Court in Americans United decided the issue based upon the federal law interpretations of the First Amendment, this court shall do the same in this case. Since the Trial Court holds that Chapter 944 does not violate the First Amendment, a fortiori, under Minnesota law Chapter 944 is also valid.

Another reason exists to compel this court to conclude that the issue here must be decided under federal law. If this court interprets that the Minnesota Constitution is more restrictive than the First Amendment of the Federal Constitution, then the Minnesota Constitution itself could be a violation of the Free Exercise Clause of the First Amendment. It is federal law that a parent has a constitutional right to determine whether his child will attend a public school or whether his child will attend a private school, even if the private school is religious. Pierce v. Society of Sisters, supra. If this right of choice is to mean anything, the state cannot make it more burdensome for a parent to send his child to a religious nonpublic school than to a nonreligious nonpublic school. Such a situation is clearly a denial of the Equal Protection Clause of the Fourteenth Amendment. This would be in effect a coerced waiver of one constitutional right in order to get another. Such

a proposition clearly violates the Equal Protection Clause. It should be noted in this vein that the U. S. Supreme Court in Wisconsin v. Yoder, supra, held that the Wisconsin compulsory attendance laws were invalid as to Amish children when application of said laws after the eight grade would gravely endanger if not destroy the free exercise of the Amish beliefs of the children.

The plaintiffs also plead that Chapter 944 violates Article IX, Sec. 1 of the Minnesota Constitution. This Article prohibits the Legislature from contracting away or from suspending taxation powers. This was an evil exercised by the territorial legislature, and the purpose of said Article is clear. Such a prohibition is not applicable in this case.

The plaintiffs also contend that Chapter 944 is special legislation in violation of Article IV, Sec. 33 of the Minnesota Constitution. The cases interpreting invalid special legislation in Minnesota clearly show Chapter 944 to be valid thereunder.

SUMMARY

At the outset of Part III of this Memorandum, the Chief Justice is quoted indicating that the question here involved is close and that good minds may differ thereon. The main struggle is to find a neutral course between the two Religion Clauses of the First Amendment. Can the Courts properly balance the two clauses and arrive at a proper conclusion?

Since the Lemon case, there have been several lower Federal Court cases in other states dealing with state aid to nonpublic schools. This Court has read these decisions but declines to use them as precedents since Chapter 944 is entitled to be determined on its own merits or defects separate and apart from statutes that are not exactly the same.

The conclusion reached here presents not only problems of law but logic. It can rightfully be asked if Lemon prohibits direct payment to schools, how can indirect payments be made to the parents? The conduit theory is the expression usually made to express such a theory. The answer is not easy but a partial answer is that income tax laws, both state and federal, allow deductions for contributions made directly to not only schools but churches. Such deductions have been in effect for many years and have never been disputed. Walz v. Tax Commission, supra.

Another logical question can be asked. If Chapter 944 is allowed to stand the nonpublic schools in Minnesota will eventually destroy the public schools. This is a fear expressed by many well-meaning groups and persons. Once again a partial answer is to point out that since 1955, our Minnesota income tax laws have allowed a parent a maximum $200.00 income tax deduction for tuition paid to nonpublic elementary and secondary schools. The fear of a take-over is perhaps unfounded because the number of private and parochial schools and the enrollments therein the steadily decreased since 1955.

Professor Paul Kauper of the Michigan Law School gave a lecture on March 11, 1971 entitled "Government and Religion, The Search for Absolutes". Extracts of the lecture are published in the Michigan Law Quadrangle Notes, Volume 15. The lecture was delivered before Lemon v. Kurtzman, supra, was decided. Professor Kauper, who is an authority on Constitutional Law, made a scholarly analysis of the question and a thorough study of all the cases up to that date. I would like to quote Professor Kauper's conclusion:

> "In short the courts may in an appropriate gesture of modesty recognize that they do not have all the wisdom

in these matters, that there is latitude for some play in the joints, and that in the area of church-state relations as in all other areas of public concern where policy considerations loom large, it is not inappropriate to leave the determination of some issues to the operation of the democratic process."

The Trial Court is impressed by this conclusion after having spent many days at trial, more days examining, digesting and evaluating briefs and many worrisome hours coming to the conclusion it has.

CONCLUSION

Laws 1971, Chapter 944 is valid under both the United States and Minnesota Constitutions.

Dated: This 6th day of July, 1972.

/s/ J. JEROME PLUNKETT
Judge of District Court

No. 372½ (1972) Ramsey County

MINNESOTA CIVIL LIBERTIES UNION, et al,
Appellants,

MINNESOTA COORDINATING COMMITTEE FOR PUBLIC EDUCATION, et al,
Appellants,

43978 vs.

STATE OF MINNESOTA, et al,
Respondents,

and

LOUIS QUAST, et al, intervenors,
Respondents,

and

JAMES P. LARKIN, et al, intervenors,
Respondents.

Todd, J.
Concurring specially,
Yetka, J.
Took no part, Sheran, C. J.,
Otis, J., Rogosheske, J., MacLaughlin, J.
Endorsed
Filed November 26, 1974
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

L. 1971, c. 944, "Nonpublic School Education Costs; Credit" is unconstitutional and violative of the Establishment Clause of the First Amendment of the United States Constitution as

interpreted in Committee for Public Education v. Nyquist, 413 U. S. 756, 93 S. Ct. 2955, 37 L. ed. 2d 948 (1973), and related cases.

Reversed.

Considered and decided by the court en banc.

OPINION

TODD, Justice.

Plaintiffs appeal from an order denying them a new trial and from judgment of the district court declaring constitutional L. 1971, c. 944, "Nonpublic School Education Costs; Credit," on the grounds that the statute is violative of the United States Constitution and of the Minnesota Constitution. The statute in question provides tax credits for parents of children attending nonpublic schools. The trial court in thorough, thoughtful, and comprehensive findings of fact, conclusions of law, and memorandum found the statute to be constitutional under the law as then interpreted by the United States Supreme Court and this court. Plaintiffs have secured several extensions of time to file briefs while this appeal was pending. These extensions have proven most beneficial to this court as subsequent decisions of the United States Supreme Court have modified and narrowed the decisions upon which the trial court based its opinion. The net effect of those decisions is to necessitate a reversal of the trial court and a holding that the statute in question is unconstitutional.

The 1971 session of the Minesota Legislature addressed itself to the problem of the financial plight of the parents exercising their constitutional rights to send their children to nonpublic schools. It sought a means to reduce their burden, to promote the state interest in maintaining such plurality of educational opportunity, and to prevent the demise of such

nonpublic schools with the substantial burden being immediately cast upon the taxpayers of the state. In response to this challenge, the legislature, after extensive hearings, passed L. 1971, c. 944 (Minn. St. 290.086). This legislation, as will be noted, seemed to meet the then existing constitutional standards applicable to such types of assistance.

Chapter 944, signed into law by the governor on June 7, 1971, was applicable to taxable years beginning after December 31, 1970. Briefly stated, the statute provides a tax credit on the state income tax of parents or legal guardians of children in kindergarten, elementary, and secondary nonpublic schools. The credit may only be claimed by those who have previously paid the nonpublic school educational costs or present proof of payment and who do not claim a deduction under Minn. St. 290.09, subd. 22.[1] The child or ward must attend a "nonpublic school", any elementary or secondary school, other than a public school, located in Minnesota, wherein a resident may fulfill the compulsory attendance law, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964. Minn. St. 290.086, subd. 3.

The trial court found that the amount of the credit pursuant to Minn. St. 290.086, subd. 5, for the calendar years 1971 and 1972 is the least of the following amounts:

> "(a) $50.00 for a kindergarten student, $100.00 for an elementary school student, and $140.00 for a secondary school student, limited by the number of months the child is enrolled,

[1] Minn. St. 290.09, subd. 22, allows a deduction from gross income of the amount paid for tuition and cost of transportation in attending an elementary or secondary school, not to exceed $200 for each dependent.

"(b) the amount paid by the parents for education cost, or

"(c)the restricted maintenance cost per pupil unit in average daily attendance, multiplied by the percentage of average public school state foundation aid, limited to the number of months the child was enrolled."

The trial court further found that for 1973 and each succeeding calendar year, the maximum credit allowed by Minn. St. 290.086, subd. 5, will be the least of the following:

"(a) the average public school state foundation aid per pupil unit for 1973, divided by the same figure for 1972, multiplied by $50.00 for a kindergarten student, $100.00 for an elementary school student, and $140.00 for a secondary school student, limited by the number of months the child is enrolled,

"(b) the amount paid by the parents for education costs, or

"(c) the restricted maintenance cost per pupil unit in average daily attendance multiplied by the average public school state foundation aid, limited to the number of months the child was enrolled."

The average public school state foundation aid percentage is the percentage of average state foundation aid per pupil unit in average daily attendance for Minnesota public elementary and secondary schools in relation to the average state and local maintenance cost per pupil unit in average daily attendance for the school year. This figure is determined by the Department of Education on or before October 1 of each year.

Education cost includes tuition, classroom instructional fees, and textbooks, excluding texts of materials used in the teach-

ing of religious tenets, doctrine, or worship. Minn. St. 290.086, subds. 2 and 4. Maintenance cost has the same meaning for public and nonpublic elementary and secondary schools.[2] In computing the tax credit maintenance cost in the nonpublic school is in all cases reduced by 20 percent and thus designated "restricted maintenance cost." Minn. St. 290.086, subd. 1.

To receive the tax credit, the parent or guardian must obtain a prepared form NSRC from the nonpublic school indicating the maximum allowable tax credit per pupil for each month of enrollment. Schedule NSC is filled out to determine the individual tax credit. Both are attached to the individual income tax return. Form NSRC-1 is the backup to form NSRC and is prepared by the nonpublic school and submitted to the Department of Taxation. NSRC-1 reflects the determination of maintenance, adjusted maintenance, restricted maintenance cost figures, and the maximum allowable credit. See, Minn. St. 290.086, subd. 7. The credit is applied dollar for dollar against the claimant's state income tax liability and if it exceeds the taxes due, the amount of the credit is paid to the claimant the same as a refund for overpayment. Minn. St. 290.086, subd. 6.

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[2] Maintenance cost is defined in Minn. St. 1969, § 124.211, subd. 2(5): "(5) actual total debt redemption and maintenance cost per pupil unit in average daily attendance for the purpose of this section shall mean the sum of the cost per pupil unit in average daily attendance for payments on principal and interest of bonded debt and maintenance exclusive of transportation, expenditures for junior colleges, veterans training program, community services, and receipts from the sale of other items sold to the individual pupil by the school such as lunches, paper, workbooks, and other materials used in the instructional program, and receipts from quasi-school activities when the school board has assumed direction and control of same; provided, that for the 1965-1966 school year it shall mean the 1964-1965 total debt redemption and maintenance cost per pupil unit in average daily attendance as indicated in this clause and for years to follow it shall mean the total debt redemption and maintenance cost per pupil unit in average daily attendance in the previous year."

On August 24, 1971, plaintiffs Minnesota Civil Liberties Union, Americans United for Separation of Church and State, and 7 Minnesota taxpayers commenced an action against the state, certain state officials, and private school officials in the District Court of Ramsey County. On September 17, 1971, plaintiffs Minnesota Coordinating Committee for Public Education, School Administrators of Minnesota, Minnesota Education Association, Minnesota Federation of Teachers, Minnesota Association of Secondary Principals, Minnesota Elementary School Principals Association, Minnesota Congress of Parent and Teachers Association, American Jewish Congress, Jewish Community Relations Council of Minnesota, First Unitarian Society of Minneapolis, Minnesota Conference of Seventh Day Adventists, and 17 Minnesota taxpayers commenced a second action against the state and certain state officials. The two actions were consolidated for trial on February 1, 1972. A motion for a temporary restraining order preventing defendants from proceeding to allow the tax credits for the current tax year was denied and trial was commenced on March 1, 1972. On July 6, 1972, the court found the statute to be constitutional. Judgment was entered for defendants on July 10, 1972. Plaintiffs' motion for amended findings of fact, conclusions of law, or a new trial was denied on September 12, 1972. Plaintiffs appealed from the judgment and order denying their motion on September 29, 1972.

Plaintiffs sought relief in this court restraining defendants from permitting the allowance of tax credits on the ensuing taxable years pending determination of the appeal. These motions were denied.

Plaintiffs allege 14 separate assignments of error in this appeal. For purposes of disposition of this case, they may be

summarized as follows: (A) Does L. 1971, c. 944, violate the Establishment Clause of the First Amendment of the United States Constitution? (1) Does c. 944 have a secular legislative purpose? (2) Does c. 944 have a principal effect of advancing religion? (3) Does c. 944 create and foster impermissible entanglement of government with religion and religion with government? (B) Does c. 944 violate provisions of the Minnesota Constituion and various other provisions of the United States Constitution?

In addition, plaintiffs ask us now also to review L. 1974, c. 556, § 20, which amends Minn. St. 1971, § 290.086, by adding the following subdivision:

> "Subd. 9. The commissioner shall not require reimbursement or restitution of any such credits or refunds previously granted, where such recipients were legally entitled thereto under laws in effect at the time such claim was filed by the applicant, or to seek recovery of any such amounts by legal action."

In disposing of plaintiffs' challenges to the statute in question, we must necessarily first determine the Federal constitutional issues before arriving at any consideration of State constitutional issues. The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

The scope of this constitutional prohibition and guarantee has been best summarized by Mr. Chief Justice Burger in Walz v. Tax Commission, 397 U. S. 664, 668, 90 S. Ct. 1409, 1411, 25 L. ed. 2d 697, 701 (1970):

"The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.

"The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other. * * *

* * * * *

"The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited."

To properly dispose of plaintiffs' challenge to the statute in question, to evaluate the trial court's disposition of this case, and to justify the conclusion reached by the court at this time, it is necessary that we briefly summarize the most recent decisions of the United States Supreme Court interpreting this difficult section of the Federal Constitution.

One of the earlier challenges of aid to nonpublic education arose in Everson v. Board of Education, 330 U. S. 1, 67 S. Ct. 504, 91 L. ed. 711 (1947). In that case, a statute which permitted local school boards to contract for the transportation of children to and from schools other than private schools operated for profit was challenged. A New Jersey school board, proceeding under such statutory authority, authorized reimbursement to parents for fees paid to public carriers by children attending nonpublic schools. A bare majority of the Supreme Court held that the expenditure of tax funds for transportation of nonpublic school students was constitutionally permissible as a general health and safety measure. The court there said (330 U. S. 15, 67 S. Ct. 511, 91 L. ed. 723):

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. * * * No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affiars of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"

The court recognized that such transportation aid assisted students in pursuit of their original training but balanced the

conflict between the religion clauses of the First Amendment in favor of the Free Exercise Clause, stating (330 U. S. 16, 67 S. Ct. 512, 91 L. ed. 724):

"* * * On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation."

Having seemingly embraced the Jeffersonian wall-of-separation concept, the court then slowly began to retreat from such an absolute position. In Zorach v. Clauson, 343 U. S. 306, 72 S. Ct. 679, 96 L. ed. 954 (1952), the court sustained the constitutionality of a released-time program whereby public school students in New York, upon presentation of written requests from their parents, were released from class before the close of the public school day so they could attend religious classes or services outside the public school premises. In 1963, in Abington School District v. Schempp, 374 U. S. 203, 83 S. Ct. 1560, 10 L. ed. 2d 844 (1963), the court in reviewing and declaring unconstitutional a Pennsylvania law which required Bible reading in the public school classrooms and a Baltimore rule which mandated reading of the Lord's Prayer, laid down for the first time guidelines for weighing legislation challenged under the Establishment Clause. The court there said (374 U. S. 222, 83 S. Ct. 1571, 10 L. ed. 2d 858):

"* * * The test may be stated as follows: what are the *purpose* and the *primary effect* of the enactment? If either is the advancement or inhibition of religion then

> the enactment exceeds the scope of legislative power as circumscribed by the Constitution." (Italics supplied.)

Later, in Board of Education v. Allen, 392 U. S. 236, 88 S. Ct. 1923, 20 L. ed. 2d 1060 (1968), the court sustained a statute authorizing local school boards to furnish secular textbooks to all students including those attending private schools. The court reasoned that the benefits which proceeded directly to the student or to his parents and were merely indirect benefits to the parochial schools, had a secular legislative purpose and a primary effect that neither advanced nor inhibited religion.

In Walz v. Tax Commission, *supra*, the court upheld the granting of tax-exempt status to church-affiliated schools, as well as to other charitable and nonprofit corporations. In passing on the constitutionality of the statute, the court restated the secular purpose and primary effect criteria of Abington v. Schempp, *supra*, and added a new criterion. The court said (397 U. S. 674, 90 S. Ct. 1414, 25 L. ed. 2d 704):

> "* * * We must also be sure that the end result—the effect—is not an excessive government entanglement with religion."

This "entanglement test" was described as one of degree. The court also recited at some length the historic precedent of the tax-exempt status of religious institutions and dwelt on the prohibitive effect of taxation upon the free exercise of religion.

Thus, there had emerged from the Supreme Court of the United States a three-part standard for analyzing questions arising under the Establishment Clause of the First Amendment: (1) A statute must have a secular legislative purpose;

(2) a statute's principal or primary effect must be one that neither advances nor inhibits religion; and (3) a statute must not foster excessive governmental entanglement with religion.

In 1971, the United States Supreme Court decided three cases—Tilton v. Richardson, 403 U. S. 672, 91 S. Ct. 2091, 29 L. ed. 2d 790 (1971); Lemon v. Kurtzman, 403 U. S. 602, 91 S. Ct. 2105, 29 L. ed. 2d 745 (1971); and Earley v. DiCenso, 403 U. S. 602, 91 S. Ct. 2105, 29 L. ed. 2d 745 (1971). In Kurtzman, the court struck down a Pennsylvania statute which gave direct subsidies to nonpublic schools. In DiCenso, the court held invalid a Rhode Island statute which supplemented the salaries of nonpublic school teachers who taught only secular subjects in secondary and elementary schools. In Tilton, the court sustained a Federal statute which provided aid to church-related colleges and universities for construction of buildings and facilities to be used exclusively for secular educational purposes. In each case the crux of the court's analysis dealth with the issue of entanglement.

In each of the cases the court had little difficulty in passing over the issue of secular purpose, and in disposing of the primary effect test, Mr. Chief Justice Burger said in Tilton (403 U. S. 679, 91 S. Ct. 2096, 29 L. ed. 2d 799):

> "* * * [T]he crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."

It is against this background that the trial court herein took evidence and evaluated the arguments of the parties. The trial court found that the statute had a valid secular purpose. We are in accord with that holding. The trial court also found that

the statute survived entanglement challenges. A great deal of the trial court's lengthy and learned memorandum dealt with the disposition of the entanglement question. Finally, the trial court found that the primary effect of the statute was not to promote the establishment of religion. Absent subsequent decision of the Supreme Court, such a finding was fully justified under the standards established by the Supreme Court in Tilton v. Richardson, *supra*.

However, during the pendency of this appeal, a series of decisions was announced by the Supreme Court of the United States which effectively changed the course and standard of measurement of establishment questions. On June 25, 1973, the following decisions were handed down by the United States Supreme Court: Committee for Public Education v. Nyquist, 413 U. S. 756, 93 S. Ct. 2955, 37 L. ed. 2d 948 (1973); Sloan v. Lemon, 413 U. S. 825, 93 S. Ct. 2982, 37 L. ed. 2d 939 (1973); Levitt v. Committee for Public Education, 413 U. S. 472, 93 S. Ct. 2814, 37 L. ed. 2d 736 (1973); Hunt v. McNair, 413 U. S. 734, 93 S. Ct. 2868, 37 L. ed. 2d 923 (1973).

In Nyquist, Mr. Justice Powell wrote for a 6-judge majority with Mr. Chief Justice Burger dissenting in part, Mr. Justice Rhenquist dissenting in part, and Mr. Justice White dissenting from the entire opinion. The court considered a New York statute which provided three forms of assistance to nonpublic education: Direct payments to the schools for maintenance costs according to a statutory formula; direct payments to low-income parents; and indirect assistance by means of tax benefits to middle-income parents. With the exception of Mr. Justice White, the entire court disposed of the direct payments to the schools for maintenance costs as violative of previous pronouncements of the court. However, in considering the re-

maining portions of the New York statute, the United States Supreme Court took what in retrospect amounts to a rather sharp turn in the line of decisions regarding First Amendment problems.

Mr. Justice Powell, writing for the majority in Nyquist, reiterated the three-part test that emerged from previous decisions. In discussing the applications of these tests, he quoted in a footnote the language of Mr. Chief Justice Burger in Tilton v. Richardson, 403 U. S. 672, 677, 91 S. Ct. 2091, 2095, 29 L. ed. 2d 790, 798, where he said (413 U. S. 773, note 31, 93 S. Ct. 2965, 37 L. ed. 2d 963):

> "* * * '[T]here is no single constitutional caliper that can be used to measure the precise degree' to which any one of them is applicable to the state action under scrutiny. Rather, these tests or criteria should be 'viewed as guidelines' within which to consider 'the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause.'"

The court had little trouble in finding a secular purpose for the legislation, however. Mr. Justice Powell added (413 U. S. 774, 93 S. Ct. 2966, 37 L. ed. 2d 963):

> "But the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State."

In evaluating these various legislative enactments, the court then gave its principal consideration to their primary effect. Considering the maintenance portion of the statute, the court said (413 U. S. 777, 93 S. Ct. 2968, 37 L. ed. 2d 965):

"* * * [T]he statute does provide a sort of statistical guarantee of separation by limiting grants to 50% of the amount expended for comparable services in the public schools. * * * Quite apart from the language of the statute, our cases make clear that a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education."

The court then referred to the earlier decisions of Earley v. DiCenso, *supra*, and Lemon v. Kurtzman, *supra*, which struck down grants not to exceed 15 percent of a teacher's annual salary and said (413 U.S. 778, 93 S. Ct. 2968, 37 L. ed. 2d 966):

"* * * Although the law was invalidated on entanglement grounds, the Court made clear that the State could not have avoided violating the Establishment Clause by merely assuming that its teachers would succeed in segregating 'their religious beliefs from their secular educational responsibilities.'"

The court held with respect to the maintenance and repair provisions that the effect inevitably was to subsidize and advance religion, and therefore had no occasion to consider the administrative entanglement aspect of the three-part test.

The court next held that the tuition reimbursement program failed the "effect test" and said (413 U. S. 780, 93 S. Ct. 2969, 37 L. ed. 2d 967):

"* * * In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid.

* * * * *

"* * * The controlling question here, then, is whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result. * * * But those decisions make clear that, far from providing a *per se* immunity from examination of the substance of the State's program, the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered."

The court concluded that the effect of the aid was unmistakably to provide desired financial support for nonpublic, sectarian institutions. The State of New York had argued that since its program involved reimbursement of tuition already paid rather than direct contributions, the parent was not a mere conduit, but free to spend the money he received in any manner and, thus, the statute guaranteed statistically the maintenance of neutrality in furthering the free exercise of religion. In response, the court said (413 U. S. 786, 93 S. Ct. 2972, 37 L. ed. 2d 970):

"* * * [I]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. Whether the grant is labeled a reimbursement, a reward or a subsidy, its substantive impact is still the same."

With regard to the statistical insurances provided in the statute, the court said (413 U. S. 788, 93 S. Ct. 2973, 37 L. ed. 2d 971):

"* * * Obviously, if accepted, this argument would provide the foundation for massive, direct subsidization of sectarian elementary and secondary schools. Our cases, however, have long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of 'effect' and 'entanglement.'"

With regard to the promotion of the free exercise of religion, the court acknowledge the balancing statements of Mr. Chief Justice Burger in Walz v. Tax Commission, *supra*, but then indicated they did not justify an eroding of the limitations of the Establishment Clause now firmly implanted.

The court found little significance in the fact that the money in question in the third section of the legislation was in the form of a tax credit. The court stated it would examine the form of the relationship for the light that it casts on the substance and quoted with aproval the dissenting opinion in the court below that (413 U. S. 791, 93 S. Ct. 2975, 37 L. ed. 2d 973) "the money involved represents a charge made upon the state for the purpose of religious education. 350 F. Supp. at 675."

The dissenting opinions expressed some dismay at the majority's apparent attempt to distinguish the Walz decision on the basis of historical precedent of granting tax-exempt status to religious and charitable institutions. However, Mr. Justice White most clearly recognized the real departure from recent precedent when he stated: "* * * But the test is one of 'primary' effect not *any* effect." 413 U. S. 813, 823, 93 S. Ct. 2993, 2998, 37 L. ed. 2d 982, 987.

In answer to the criticisms and objections raised in the dissent, Mr. Justice Powell said (413 U. S. 783, note 39, 93 S. Ct. 2971, 37 L. ed 2d 969):

"Appellees, focusing on the term 'principal or primary effect' which this Court has utilized in expressing the second prong of the three-part test, *e. g. Lemon v. Kurtzman, supra,* at 612, have argued that the Court must decide in this case whether the 'primary' effect of New York's tuition grant program is to subsidize religion or to promote these legitimate secular objectives. MR. JUSTICE WHITE'S dissenting opinion, *post,* at 823, similarly suggests that the Court today fails to make this 'ultimate judgment.' *We do not think that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have a 'primary' effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion.* In *McGowan v. Maryland, supra,* Sunday Closing Laws were upheld not because their effect was, first, to promote the legitimate interest in a universal day of rest and recreation and only secondarily to assist religious interests. Instead, approval flowed from the finding, based upon a close examination of the history of such laws, that they had only a 'remote and incidental' effect advantageous to religious institutions. *Id.,* at 450. See also *Gallagher v. Crown Kosher Super Market,* 366 U. S. 617, 630 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley,* 366 U. S. 582, 598 (1961) Likewise, in *Schempp* the school authorities argued that Bible-reading and other religious recitations in public schools served, primarily, secular purposes, including 'the promotion of moral values, the contradiction to the material trends of the times, and the

perpetuation of our institutions and the teaching of literature.' 374 U. S., at 23. Yet, without discrediting these ends and without determining whether they took precedence over the direct religious benefit, the Court held such exercises incompatible with the Establishment Clause. See also 374 U. S., at 278-281 (Brennan, J., concurring). *Any remaining question about the contours of the 'effect' criterion were resolved by the Court's decision in Tilton, in which the Court found the mere possibility that a federally-financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might 'in part have the effect of advancing religion.'* 403 U. S., at 683.

"It may assist in providing an historical perspective to recall that the argument here is not a new one. The Preamble to Patrick Henry's Bill Establishing a Provision for Teachers of the Christian Religion, which would have required Virginians to pay taxes to support religious teachers and which became the focal point of Madison's Memorial and Remonstrance, see n. 28, *supra*, contained the following listing of secular purposes:

" 'The general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their views, and preserve the peace of society * * *.' *Everson v. Board of Education*, 330 U. S., at 72 (Supplemental Appendix to dissent of Rutledge, J.). *Such secular objectives, no matter how desirable and irrespective whether judges might possess sufficiently sensitive calipers to ascertain whether the secular effects outweigh the sectarian benefits, cannot serve today any more than they could 200 years ago to justify such a direct and substantial advancement of religion.*" (Italics supplied.)

This court must consider and evaluate L. 1971, c. 944, in the light of the majority opinion of the recent decision of the United States Supreme Court. In applying the three-part test, we have no difficulty, as previously stated, in determining that the secular purpose objective and requirement is met. In applying the "primary effects test," we must be guided by the realization, as indicated above, that this is no longer a primary effects test, but an "any effects" test. Under such a standard, the legislation in question cannot pass constitutional muster. The encompassing language of Nyquist quoted above clearly disposes of all of the arguments raised by respondents which would seek to distinguish this case from the holding of Nyquist. Any doubt that such a result is dictated by the United States Supreme Court decision is resolved by reference to the case of Kosydar v. Wolman, 353 F. Sup. 744 (S. D. Ohio 1972), certiorari denied, sub nom. Grit v. Wolman, 413 U. S. 901, 93 S. Ct. 3062, 37 L. ed. 2d 1021 (1973).[3] This case involved interpretation of a tax credit under Ohio law quite similar to the Minnesota statute. The court stated (353 F. Supp. 766):

> "The realigned parties have urged this Court to follow the precedent of Minnesota Civil Liberties Union v. State of Minnesota, Nos. 379526 and 380252 (District Court Ramsey County, Minn., July 6, 1972) which affirmed against state and federal constitutional challenge, a tax credit scheme designed to benefit nonpublic school par-

[3] This conclusion is further supported by the summary affirmance by the United States Supreme Court of Franchise Tax Board of California v. United Americans for Public Schools (N. D. Cal.) February 1, 1974 (unreported decision) wherein legislation similar to L. 1971, c. 944, was found to violate the Establishment Clause. Franchise Tax Board of California v. United Americans for Public Schools, —— U. S. ——, —— S. Ct. ——, —— L. ed 2d ——, 43 U. S. Law Week 3224.

ents. To the extent, however, the decision of the Minnesota court rested in part on a view of the Free Exercise Clause which we have here rejected, we decline to follow its holding."

While not dealing with all issues raised in this case, the reference to the refusal to follow the Free Exercise Clause disposes of the only possible means of salvaging the legislation under the constitutional mandates of Nyquist and related cases. The majority opinion in Nyquist disregarding the balancing approach of Walz and related cases has chartered a new course, giving clear preference to the Establishment Clause over the Freedom of Exercise Clauses of the First Amendment.

Having reached the disposition of this issue on the basis of the primary effect test as it now exists, we need not consider the entanglement issue.

Because of our disposition of the issue upon Federal constitutional grounds, we also need not consider questions raised under the Minnesota Constitution. However, we wish to put to rest any challenges to the validity of Minn. Const. art. 8, § 2, which provides as follows:

"The legislature shall make such provisions, by taxation or otherwise, as, with the income arising from the school fund, will secure a thorough and efficient system of public schools in each township in the State.

"But in no case shall the moneys derived as aforesaid, or any portion thereof, or any public moneys or property, be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught."

This section was added to our constitution by amendment in 1877 by a vote of 36,780 for, and 16,667 against. At the same election, a total of 98,614 votes were cast for gubernatorial candidates. Respondent Louis Quast challenges this amendment on the ground that it was not properly ratified and thus is not part of the constitution. The trial court analyzed and properly interpreted the applicable constitutional provisions in cases involving these provisions and held that the amendment was properly ratified. We affirm that decision.

We would be remiss if we failed to comment upon the abject failure of our courts and the parties involved in this litigation to recognize that the major problem being dealt with here is society's concern for the children involved. Surely the goal of our society is to provide the best possible educational opportunities to all of our youth. In San Antonio Independent School v. Rodriguez, 411 U. S. 1, 93 S. Ct. 1278, 36 L. ed. 2d 16 (1973), education was held not to be a fundamental right under the Federal Constitution. We do not now pass on that question under the state constitution. Suffice to say, it should be a proper legislative goal to provide equal opportunity to all children to have available to them the resources of all public school facilities and to avoid the denial of any of these services to them merely on the fact that their parents, in the exercise and control of their children, and in the exercise of their freedom of choice and freedom of religion, have chosen to have their children attend classes at a nonpublic school. To deny access to the services and facilities of the public schools on a part-time basis to these students would seem to create a special class of children, namely, those attending public schools, in violation of the tenets of the equal protection of the laws.

Finally, appellants have asked us to review the effect of L.

1974, c. 556, § 20, quoted above. As this question was not before the trial court and is not an issue in this case, such a review would amount to an advisory opinion which we cannot properly give. Seiz v. Citizens Pure Ice Co. 207 Minn. 277, 290 N. W. 802 (1940); Rice v. Austin, 19 Minn. 74 (103) (1872); In the Matter of the Application of the Senate, 10 Minn. 56 (78) (1865).

The judgment is reversed and L. 1971, c. 944, is herewith declared unconstitutional. Neither party shall be allowed costs or disbursements on this appeal.

YETKA, Justice (concurring specially).

Although the majority decision of this court is mandated by the recent opinions of the United States Supreme Court which apparently forbid any direct aid to nonpublic schools, I am compelled to state that there appears to be a sharp departure from past precedent.

It is difficult to perceive the distinction between striking down a tax credit allowed for sending a child to a nonpublic school when that school must follow a state prescribed curriculum and where no part of the tax credit may be used for the teaching of religion oriented subjects, and yet, on the other hand, upholding the constitutionality of granting tax-exempt status to churches, and, further, to allow an individual a tax deduction for contributions to his church. This case points out once again that while a strong philosophical argument could be made against all tax exemptions or deductions, this is a province that is better left to legislative determination, not to the courts.

If this recent trend of decisions by the United States Supreme Court continues to its logical conclusion, the decision

of Walz v. Tax Commission, 397 U. S. 664, 90 S. Ct. 1409, 25 L. ed. 2d 697 (1970), appears in jeopardy.

I do not fear that the legislation at issue in the instant case would somehow foster the establishment of any religion. There is a distinction between actively supporting a religion or religions, and offering private education the chance to exist and to be available to all parents—poor or middle class, as well as the wealthy—who choose to exercise the right to send their children to nonpublic schools.

The strict scrutiny that legislation, such as that struck down today, must undergo appears far beyond the degree of protection necessary to insure that our nation will be free from a "state religion" or religious persecution of its citizens. Rather, our legislature appears now to be barred from making any reasonable effort to insure that nonpublic education will survive except for the very wealthy. However, the highest court in our land has spoken, and this court and our legislature must adhere to its word.

MR. CHIEF JUSTICE SHERAN, MR. JUSTICE OTIS, MR. JUSTICE ROGOSHESKE, and MR. JUSTICE MACLAUGHLIN took no part in the consideration or decision of this case.

(Petition for Reargument Filed)

STATE OF MINNESOTA
OFFICE OF CLERK OF SUPREME COURT

St. Paul, Minn.

December 6, 1974

MINNESOTA CIVIL LIBERTIES UNION, et al.,
Appellants,

and

MINNESOTA COORDINATING COMMITTEE FOR PUBLIC EDUCATION, et al.,
Appellants,

vs.

STATE OF MINNESOTA et al.,
Respondents,

and

LOUIS QUAST, et al.,
Intervenor Respondents,

and

JAMES P. LARKIN, et al.,
Intervenor Respondents.

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

Applications for reargument having been filed herein all further proceedings, except taxation of costs are stayed pending determination.

Yours respectfully,
JOHN McCARTHY
Clerk Supreme Court

A petition for reargument does not stay taxation of costs and disbursements.

(Petition Denied)

STATE OF MINNESOTA
OFFICE OF CLERK OF SUPREME COURT

St. Paul, Minn.

December 26, 1974

MINNESOTA CIVIL LIBERTIES UNION, et al.,
Appellants,

and

MINNESOTA COORDINATING COMMITTEE FOR PUBLIC EDUCATION, et al.,
Appellants,

vs.

STATE OF MINNESOTA, et al.,
Respondents,

and

LOUIS QUAST, et al.,
Intervenor Respondents,

and

JAMES P. LARKIN, et al.,
Intervenor Respondents.

Supreme Court No. 43978

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,
JOHN McCARTHY
Clerk Supreme Court

STATE OF MINNESOTA, SUPREME COURT
MINNESOTA CIVIL LIBERTIES UNION, et al.,
Appellants,

MINNESOTA COORDINATING COMMITTEE FOR PUBLIC EDUCATION, et al.,
Appellants,

vs. 43978

STATE OF MINNESOTA, et al.,
Respondents,

and

LOUIS QUAST, et al., intervenors,
Respondents,

JAMES P. LARKIN, et al., intervenors,
Respondents.

TRANSCRIPT OF JUDGMENT

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment and order of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Ramsey be and the same hereby are in all things reversed.

Dated and signed December 27, 1974.

By the Court:

Attest:

JOHN McCARTHY, Clerk

State of Minnesota
Supreme Court—ss.

I, John McCarthy, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the case therein entitled, as appears from the original remaining of record in my office; that I have care-

fully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, December 27, 1974.

JOHN McCARTHY, Clerk
By Wayne Tschimperle, Deputy

MINNESOTA STATUTES
INCOME AND EXCISE TAXES

§ 290.086 Nonpublic school education costs, credit.

Subdivision 1. As used in sections 290.086 and 290.087, "maintenance cost" shall, when applied to public elementary and secondary schools, have the meaning intended and applied in Minnesota Statutes 1969, Section 124.211, Subdivision 2, (5); when applied to nonpublic elementary and secondary schools, shall have the same meaning intended and applied in Minnesota Statutes 1969, Section 124.211, Subdivision 2, (5) less 20 percent of whatever amount is calculated thereunder which shall hereinafter be designated as "restricted maintenance cost."

Subd. 1a. As used in sections 290.086 and 290.087 "foundation aid" shall mean total foundation aid, or its equivalent, exclusive of summer school aid, earned for public elementary and secondary school pupils for any school year.

Subd. 2. As used in sections 290.086 and 290.087, "education cost" shall mean and include tuition, classroom instructional fees, and textbooks as defined in sections 290.086 and 290.087.

Subd. 3. As used in sections 290.086 and 290.087, "nonpublic school" shall mean and include any elementary or

secondary school, other than a public school situated in this state, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, is not operated for a profit, and adheres to the provision of the Civil Rights Act of 1964.

Subd. 4. As used in sections 290.086 and 290.087, "textbooks" shall mean and include books and other instructional materials and equipment purchased through the nonpublic school of enrollment and used in nonpublic schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship.

Subd. 5. Taxes due under the computation in accordance with Minnesota Statutes 1969, Section 290.06, shall also be credited with the amount paid per student to others for education costs incurred in nonpublic schools in this state, but not to exceed an amount per pupil unit, as counted in Minnesota Statutes 1969, Section 124.17, subdivision 1, paragraphs 1 and 2, as follows: (a) During the calendar years 1971 and 1972, an amount not exceeding $100 per pupil unit and (b) during the calendar year 1973 and each year thereafter the amount allowed as a tax credit per pupil unit shall be the result of the following calculations: (a) Divide the average Minnesota public elementary and secondary school foundation aid payment per pupil unit in average daily attendance of the school year completed during the same calendar year for which the tax credit is claimed, as determined and published by the state department of education based upon the results of final adjustments made by the state aids, statistics and research section

of the division of administration of said state department as of October of each year, by the same average foundation aid from the previous school year; (b) multiply the result of the above calculation by the tax credit per pupil unit allowed in the first paragraph of this subdivision for the preceding calendar year; (c) the result of the calculations (a) and (b) above is the maximum tax credit per pupil unit to be allowed herein for the taxable years after calendar year 1972.

However, in no event, shall any tax credit per pupil unit allowed per student under this section, when related to the individual nonpublic school restricted maintenance cost per pupil unit in average daily attendance of the school year completed during the same calendar year for which the tax credit is claimed, exceed the percent of the average state foundation aid per pupil unit in average daily attendance for Minnesota public elementary and secondary schools in relation to the average state and local maintenance cost per pupil unit in average daily attendance in said public schools for the school year completed during the same calendar year for which the tax credit is claimed. Said average state foundation aids and state and local maintenance costs shall be as determined and published by the state department of education based upon results of final adjustments made by the state aids, statistics and research section of the division of administration of said state department as of October 1 of each year.

Whenever the words "per pupil unit in average daily attendance" appear in sections 290.086 and 290.087 it is intended that whatever alternative measure may be designated by law to calculate state foundation aid for public schools shall be substituted for said words and used as the basis for the calculations in sections 290.086 and 290.087.

Subd. 6. If the allowable amount of the claim authorized as a tax credit in subdivision 5 exceeds the state income taxes otherwise due on the claimant's income in any year or if there are no state income taxes due on the claimant's income in any year, the amount of the claim not used as an off-set against income taxes, subject to audit by the department of taxation, shall be paid to the claimant in the same manner as a refund for overpayment of a tax.

Subd. 7. No claim for credit as provided in subdivision 5 shall be allowed unless the claim for the tax credit is in possession of the department of taxation on or before the time designated for the filing of income tax returns in Minnesota Statutes 1969, Section 290.42. Failure to file and make such claim on the income tax return duly required in the year following the year for which the tax credit is claimable shall bar such claim.

No claim for credit shall be allowed unless accompanied by: (a) A receipt, or receipts, for each student signed by an official of the student's nonpublic school of enrollment showing the following information: (1) The name and location of the nonpublic school in which the student is enrolled; (2) the date of payment and the amount paid for education costs and textbooks; (3) the grade in which the student is enrolled during the period for which payment was made; (4) the name of the student and name of the remitter; (b) a certification from each nonpublic school of enrollment during the calendar year current to December 31 of each year showing: (1) that such nonpublic school satisfies the requirements of Minnesota Statutes 1969, Section 120.10, Subdivision 2; (2) the restricted maintenance cost of education per pupil unit in average daily attendance in the school of enrollment based upon the most

recently completed school year; (3) the total moneys paid by the taxpayer to the nonpublic school for education costs; (4) the maximum allowable tax credit per student for each month of enrollment in said nonpublic school for that calendar year; (5) the months, or portions thereof, during which the student was enrolled in said school and the student's name.

The total claim for tax credit shall be based upon ten school months, or portions thereof, for each calendar year; the claim shall be limited to ten percent of the total maximum allowable claim per month for each school calendar month, or portion thereof, during which the student is enrolled in a nonpublic school but not to exceed ten months for any given school year excluding summer or extra school sessions outside the regular school year session. The nonpublic school and grade of enrollment on the first school day attended by the student in any given school month during the regular school session shall be the designated school and grade of enrollment for that entire school month.

Subd. 8. Such tax credit claim may be filed only by the parent or legal guardian who made the payment or presents the proof of payment thereof and only one claim may be filed for any student per taxable year. In the event more than one the parent paying the greatest amount, or presenting proof of the parent paying the greates amount, or presenting proof of payment thereof, shall have the right to file the tax credit claim based only upon the amount he has paid or presents proof of payment for.

Added by Laws 1971, c. 944, §1.

290.087 Limitations, redeterminations, violations and penalties

Subdivsion 1. No taxpayer shall claim any deduction for tuition or cost of transportation of any dependent pursuant to Minnesota Statutes 1969, Section 290.09, Subdivision 22, if he claims a tax credit for such dependent or if anyone else claimed an income tax credit under section 290.086, subdivision 5.

Subd. 2. The commissioner of taxation, within the applicable period of limitations, may offset the amount of the credit provided by section 290.086, subdivision 5 against any liability for income tax on the part of the individual claiming the credit and shall pay the balance due, if any, to such individual.

Subd. 3. Whenever on the audit of any claim filed under section 290.086 the tax department determines the amount thereof to have been incorrectly determined, the department shall redetermine such claim and notify the claimant of such redetermination and the reasons therefor. Such redetermination shall be final unless appealed to the Minnesota tax court within 30 days of notice thereof.

Subd. 4. In any case in which it is determined that a claim is or was filed with fraudulent intent, the claim shall be disallowed in full, and if the claim has been paid or credit has been allowed against income taxes otherwise payable, the credit shall be cancelled and the amount paid may be recovered by assessment as income taxes are assessed. A penalty of $25 percent shall be imposed and such assessment shall bear interest from the due date of the return until refunded or paid, at the rate of six percent per annum. The claimant in such case, and any person who assisted in the preparation or filing of such excessive claim or supplied information upon which

such excessive claim was prepared, with fraudulent intent, shall be guilty of a misdemeanor.

Subd. 5. In any case in which it is determined that a claim is or was excessive, a ten percent penalty shall be imposed on such excess and if the claim has been paid, or credited against income taxes otherwise payable, the credit shall be reduced or cancelled, and the proper portion of any amount paid shall be similarly recovered by assessment as income taxes are assessed and such assessment shall bear interest at six percent per annum from the date of payment until refunded or paid.

Subd. 6. In the event a taxpayer files a return and tax credit claim after paying education costs in advance which were used as the basis for said claim and after filing said claim, for some valid reason, all or part of said education costs are refunded then said taxpayer shall, within 60 days of receiving said refund, file an amended income tax return and claim disclosing proper eligibility, or lack of same, for the income tax credit provided in section 290.086 and remit the income taxes subsequently due, if any. Added by Laws 1971, c. 944, §2.

Laws 1971, c. 944, §3, provides: "This act is in effect for the taxable years beginning after December 31, 1970."

TABLE OF CONTENTS

Page

Questions presented 3

Statement of facts 4

Reasons for denying the writ:
The Minnesota Supreme Court decision is in firm and complete accord with previous decisions of this Court 12

Conclusion 18

TABLE OF AUTHORITIES

Statutes:

M.S.A. 290.86, Subd. 7 (a)(b)(2) 9
Minnesota Statutes §§290.86 and 290.087 4
Minnesota Statutes 1969, Section 390.09, Subd. 22 .. 12

Constitutions.

Minnesota Constitutions:
Article I, §2 5
Article I, §16 5
Article IV, §33 5
Article VIII, §2 5
Article IX, §1 5

U. S. Constitutions:
First Amendment 3, 5, 14, 16
Fourteenth Amendment 5

Cases:

Committee for Public Education v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955, 37 L. ed. 2d 948 (1973) 3, 13, 14, 15, 16, 17

Franchise Tax Board of California v. United Americans for Public Schools, — U.S. —, 95 S. Ct. 166, 43 U.S. Law Week 3224 .....3, 4, 14

Grit v. Wolman, 413 U.S. 901, 93 S. Ct. 3062, 37 L. ed. 2d 1021 (1973) 3

Hunt v. McNair, 413 U.S. 734, 93 S. Ct. 2868, 37 L. ed. 2d 923 (1973) 3, 13
Kosydar v. Wolman, 353 F. Supp. 744 (S. D. Ohio 1972) 3, 14, 17
Levitt v. Committee for Public Education, 413 U.S. 472, 93 S. Ct. 2814, 37 L. ed. 2d 736 (1973) 3, 13, 17
Sloan v. Lemon, 413 U.S. 825, 93 S. Ct. 2982 37 L. ed 2d 939 (1973) 3, 13
Tilton v. Richardson, 403 U.. 672, 679, 91 S. Ct. 2091, 29 L. ed. 2d 790, 799 (1971) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. ——

STATE OF MINNESOTA,
ARTHUR C. ROEMER, Commissioner of Taxation, Income Tax Division, Department of Taxation, State of Minnesota,
GEROME T. CAULFIELD Coordinator, Income Tax Division, Department of Taxation, State of Minnesota,
VAL BJORNSON, Treasurer, State of Minnesota,
ROLLAND F. HATFIELD, Auditor, State of Minnesota,
HOWARD B. CASMEY, Commissioner of Education, State of Minnesota,
RICHARD L. BYE, DAVID C. BRANDON, DANIEL BURTON, B. ROBERT LEWIS, RALPH H. PETERSON, MARY JO RICHARDSON, GEORGE A. ROSSMAN, HENRY E. SCHROEDER AND LOUIS R. SMERLING, as members of the State Board of Education, State of Minnesota,
SAMUEL L. RICHARDSON, Commissioner, Department of Human Rights, State of Minnesota,

Petitioners,

and

LOUIS QUAST, RICHARD G. CONLIN, JOSEPH L. LEWIS AND MANUEL RIVERA, INTERVENORS,

Petitioners,

and

JAMES P. LARKIN, HARRIS DUININCK, BERT VAN'T HULL, ALBERT F. MARTIN, ROBERT GEORGE ZABEL, AND ROBERT ULRICH, INTERVENORS,

Petitioners,

vs.

MINNESOTA CIVIL LIBERTIES UNION,
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,
MATTHEW STARK, individually, and as a representative of the class of all taxpayers of the State of Minnesota,
DONALD E. KRAUSE, individually, and as a representative of the class of all taxpayers of the State of Minnesota,
KATHLEEN E. HAUSER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

ROLFE E. HAUSER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

CARL LUNDSTROM, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

ELEANOR OTTERNESS, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

WILLIAM B. OTTERNESS, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

Respondents.

and

MINNESOTA COORDINATING COMMITTEE FOR PUBLIC EDUCATION;

SCHOOL ADMINISTRATORS OF MINNESOTA;

MINNESOTA EDUCATION ASSOCIATION;

MINNESOTA FEDERATION OF TEACHERS;

MINNESOTA ASSOCIATION OF SCHOOL ADMINISTRATORS;

MINNESOTA ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS;

MINNESOTA ELEMENTARY SCHOOL PRINCIPALS ASSOCIATION;

MINNESOTA CONGRESS OF PARENT AND TEACHERS ASSOCIATIONS;

AMERICAN JEWISH CONGRESS;

JEWISH COMMUNITY RELATIONS COUNCIL OF MINNESOTA;

FIRST UNITARIAN SOCIETY OF MINNEAPOLIS;

MINNESOTA CONFERENCE OF SEVENTH DAY ADVENTISTS;

BRUCE A. OLANDER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

VALERIE V. OLANDER, by BRUCE A. OLANDER, as her Guardian ad Litem;

MRS. JANET M. SIGFORD, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

EDWARD HENKEN, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

FRANKLIN G. EMRICK, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

TOLLIE J. FLIPPIN, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

MRS. ROBERT ROSE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

EDWARD BOLSTAD, individually and as a representative of the class of all taxpayers of the State of Minnesota;

A. L. GALLOP, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

JAMES J. ROSASCO, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

DAVID W. MEADE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
MRS. ARVIS NELSON, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
L. E. WERMAGER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
CHARLOTTE CARMAUCHE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
MARY VAN KIRK, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
WAYNE VAN KIRK individually, and as a representative of the class of all taxpayers of the State of Minnesota;
CALVIN DIDIER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
SAMUEL L. SCHEINER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

QUESTIONS PRESENTED

The Minnesota Supreme Court did not err in holding that the Minnesota Tax Payment-Tax Credit Act violated the Establishment Clause of the First Amendment to the United States Constitution, as required by *Committee for Public Education v. Nyquist,* 413 U.S. 756, 93 S. Ct. 2955, 37 L. ed. 2d 948 (1973); *Sloan v. Lemon,* 413 U.S. 825, 93 S. Ct. 2982, 37 L. ed. 2d 939 (1973); *Levitt v. Committee for Public Education,* 413 U.S. 472, 93 S. Ct. 2814, 37 L. ed. 2d 736 (1973); *Hunt v. McNair,* 413 U.S. 734, 93 S. Ct. 2868, 37 L. ed. 2d 923 (1973); *Kosydar v. Wolman,* 353 F. Supp. 744 (S. D. Ohio 1972), certiorari denied, sub nom. *Grit v. Wolman,* 413 U.S. 901, 93 S. Ct. 3062, 37 L. ed. 2d 1021 (1973); and *Franchise Tax Board of Calif-*

ornia v. United Americans for Public Schools, — U.S. —, 95 S. Ct. 166, 43 U.S. Law Week 3224.

STATEMENT OF FACTS

The 1971 Minnesota State Legislature passed Ch. 944, which was signed into law by the Governor June 7, 1971. The Act is in effect for the taxable years beginning after December 31, 1970. The Act is set forth in the Appendix (A.-134, et seq.).

Ch. 944 was passed during the regular session. It allows parents of children attending nonpublic elementary and secondary schools in Minnesota to credit a portion of their educational costs against their State income tax. Cash payments are made to the claimants by the State if the credits exceed the tax due. Ch. 944 is to be found in *Minnesota Statutes* §§290.086 and 290.087, and is hereafter referred to as "The Minnesota Tax Credit-Payment Act" or "the Act".

On August 24, 1971, the Minnesota Civil Liberties Union and Americans United for Separation of Church and State jointly commenced a lawsuit on behalf of themselves and with seven Minnesota taxpayers to declare the Act unconstitutional and to enjoin its operation (A.-1).

On September 14, 1971, a second action was brought to declare Ch. 944 unconstitutional and to enjoin its operation. This second action was brought by Minnesota Coordinating Committee for Public Education, an unincorporated voluntary association of educational groups who support public education and who oppose public financing of religion, religious education and private education (A. 23).

Also plaintiffs in this second action are the School Ad-

ministrators of Minnesota, the Minnesota Education Association, the Minnesota Federation of Teachers (AFL-CIO), the Minnesota Association of Secondary School Principals, the Minnesota Elementary School Principals Association, the Minnesota Congress of Parent and Teachers Associations, the American Jewish Congress, the Jewish Community Relations Council of Minnesota, the First Unitarian Society of Minneapolis, the Minnesota Conference of Seventh Day Adventists, and 17 Minnesota taxpayers (A.-23).

The defendants in the second action were the State of Minnesota, the Commissioner of Taxation, the Commissioner of Education, the State Treasurer and the State Auditor.

Both actions were for a declaratory judgment and injunctive relief alleging that the Act violates Article VIII, §2, Article I, §16, Article IV, §33, Article IX, §1 and Article I, §2 of the Minnesota State Constitution; and alleging violation of the Establishment and Free Exercise Clauses of the First Amendment to the U. S. Constitution as applied to the states through the Fourteenth Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U. S. Constitution (A.-1; A.-23).

In an Order filed February 1, 1972, the trial court granted the plaintiffs' motions to consolidate the cases for trial. Subsequently, two groups of parents of children in non-public schools moved the trial court for permission to intervene, and prior to trial the trial court granted their motions to participate as intervenor-defendants.

On February 1, 1972, the trial court denied the State of Minnesota motion to dismiss organizational plaintiffs

for lack of standing in the Minnesota Civil Liberties Union action, denied the State of Minnesota motion to dismiss on the basis that there was lacking a justifiable controversy, denied the State of Minnesota motion to strike paragraph 19 of the Minnesota Civil Liberties Union complaint, and denied the State of Minnesota motion to dismiss the State Commissioner of Education, members of the Minnesota State Board of Education and the Commissioner of the Department of Human Rights.

Also, on February 1, 1972, the trial court denied the State of Minnesota motion to dismiss the organizational plaintiffs for lack of standing in the Minnesota Coordinating Committee for Public Education action, denied the State of Minnesota motion to dismiss this action on the basis that there has lacking a justifiable controversy, denied the State of Minnesota motion to strike paragraphs 2, 3 and 9 of the complaint, striking paragraph 21 which alleges that lobbying activities took place, and taking judicial notice that lobbying activities are done with taxing laws and this law, and denied the State of Minnesota motion to dismiss the Commissioner of Education as a defendant.

Prior to trial, plaintiffs moved the trial court for a temporary injunction restraining the operation of its Act until the main action was determined. The trial court denied plaintiffs' motions for a temporary injunction and the trial of the case was heard by Judge J. Jerome Plunkett from March 1, 1972, through March 8, 1972.

The District Court made its Findings of Fact, Conclusions of Law and Order for Judgment, dated July 6, 1972, and judgment was entered by the Clerk upon said Order for Judgment on July 10, 1972.

Respondents timely moved for a new trial and amended

Findings of Fact and Conclusions of Law which was heard by the District Court on August 30, 1972, and the trial court denied Appellants' said motion by an order dated September 12, 1972.

The Minnesota Supreme Court herd the appeal April 1, 1974, and filed its decision November 26, 1974.

The Act provides for a direct payment or tax credit, not a tax deduction, based upon the following for the years 1971 and 1972:

1. The amount paid by the parent or legal guardian for education costs.

2. The Minnesota Nonpublic School's Restricted Maintenance Cost (maintenance cost less 20%) per pupil in average daily attendance times the percentage of average State Foundation Aid; limited to the number of months a pupil was enrolled in such nonpublic elementary or secondary school during the calendar year.

3. The maximum allowable credit is limited to $50.00 for a kindergarten pupil, $100.00 for an elementary school pupil, and $140.00 for a secondary school pupil (T.-63-79; 81-82; A.-134).

This is not a deduction, but the credit is a dollar for dollar reduction of the tax owed, and if the credit exceeds the tax liability, a payment is paid as a refund to the taxpayer. (Court's finding No. 11; A.-73).

The Department of Taxation has not promulga'ed any regulations to implement the Act (T.-114-116, 163; Court's finding No. 16; A.-13).

The Department of Taxation has made and distributed

three forms and an instruction circular, which are all sent to the nonpublic schools, that is, Form NSRC-1, Form NSRC, Schedule NSC, and Circular NSC. On Form NSRC-1, the school must compute maintenance cost for the schol year, including administration, salaries for instruction, textbooks and other instructional and educational materials, attendance and health services, transportation cost, cost of operation of plant, cost of food services and cost of student activities disbursements; then the school must deduct income from the sale of textbooks and other instructional and educational materials and supplies, receipts from the sale of lunches, student activities receipts up to the amount of the expenditure, receipts for transportation and refunds received or disbursements made; these deductions from maintenance costs for the school year equals the adjusted maintenance cost from which the school must subtract federal monies received; the school must then compute the average daily attendance based upon pupil units which is divided by the average daily attendance; the equivalent maintenance cost per pupil unit in average daily attendance is multiplied by 80 percent, which gives the figure of the restricted maintenance cost per pupil unit in average daily attendance; the restricted maintenance cost per pupil unit in average daily attendance is multiplied by the percentage of average state foundation are paid per pupil unit which gives the maximum allowable credit per pupil for the calendar year (T.-47, 48, 52-59, 66-69, 71-74).

The maximum allowable credit on the tax return is the lower of:

1. The amount actually paid;

2. The restricted maintenance cost formula. or

3. The allowable credit of $50, $100 or $140 dependent on the gade attended (Court's finding No. 26, A.-74-75).

Further, the Act, *M.S.A.* 290.086, Subd. 7 (a)(b)(2)—requires a receipt or receipts for each student filed by an official of the student's nonpublic school of enrollment reporting the restricted maintenance cost of education per pupil unit in average daily attendance in the school of enrollment based upon the most recently completed school year. The law does not specify the method and manner of reporting the accounting procedure, nor the accounting practices to be used, unlike the Minnesota public schools which are required by law to report to the Commissioner of Education detailed financial reports and attendance regulated by a two-inch thick accounting manual specifying the particular accounting methods, procedures, practices and forms to be used. The Commissioner of Taxation and his assistant said that Form NSRC-1 must be filed to implement the Act (T.-5-87, 109-118, 223-225).

Gerome Caulfield of the Department of Taxation testified that he was assigned the task of coordinating the implementation of the Act for the Department including designing the instructions to taxpayers and the various forms used by taxpayers and the nonpublic schools; he explained the operation of the Act and the use and function of the various forms (T.-47-74).

The nonpublic school gives the Form NSRC to the claimants to be attached to claimants' income tax returns (Court's finding No. 19; A-74).

The Schedule NSC is a summary form essentially for the

assistance of the claimant and the convenience of the Department of Taxation, the form is not specifically required by the terms of the Act nor by the Department of Taxation (T.-47-74; Court's finding No. 23; A.-74).

During the calendar year 1973 and each year thereafter the amount allowed as a tax credit per pupil unit shall be the result of the following calculations: (a) Divide the average Minnesota public elementary and secondary school foundation aid payment per pupil unit in average daily attendance of the school year completed during the same calendar year for which the tax credit is claimed, as determined and published by the State Department of Education based upon the results of final adjustments made by the state aids, statistics and research section of the division of administration of said state department as of October of each year, by the same average foundation aid from the previous school year; (b) multiply the result of the above calculation by the tax credit per pupil unit allowed in the first paragraph of this subdivision for the preceding calendar year; (c) the result of the calculations (a) and (b) above is the maximum tax credit per pupil unit to be allowed herein for the taxable years after calendar year 1972 (Court's findings Nos. 26-28; A.-74-76).

The Act provides that in no event shall any tax credit per pupil unit allowed per student under this section, when related to the individual nonpublic school restricted maintenance cost per pupil unit in average daily attendance of the school year completed during the same calendar year for which the tax credit is claimed, exceed the percent of the average state foundation aid per pupil unit in average daily attendance for Minnesota public elementary and secondary schools in relation to the average state and local

maintenance cost per pupil unit in average daily attendance in said public schools for the school year completed during the same calendar year for which the tax credit is claimed. Said average state foundation aids and state and local maintenance costs shall be as determined and published by the state department of education based upon results of final adjustments made by the state aids, statistics and research section of the division of administration of said state department as of October 1 of each year (Court's findings Nos. 29-37. A.-76-77).

"Education cost" is defined in the act to mean and include books and other instructional materials and equipment purchased through the nonpublic school of enrollment and used in nonpublic schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship (Court's findings No. 31; A.-76; T.-85).

If textbooks are furnished by the school, however, they become a part of the school's maintenance costs, and such textbooks included in maintenance costs could include textbooks which are used in the teaching of religious tenets, doctrines or worship (Court's finding No. 31; A.-76; T.-84-87).

For the claimant to be entitled to the credit, the child or ward must attend a "nonpublic school", which is defined as any elementary or secondary school, other than a public school, situated in this state, wherein a resident of this state may fulfill the state's compulsory attendance laws, is not operated for profit, and adheres to the provisions

of the Civil Rights Act of 1964 (Court's finding No. 15: A.-73).

No taxpayer shall claim any deduction for tuition or cost of transportation of any dependent pursuant to *Minnesota Statutes* 1969, Section 390.09, Subd. 22, if he claims a tax credit for such dependent or if anyone else claimed an income tax credit under the Act (T.-918-919; the Court's findings Nos. 13, 14; A.-73).

Eighty-five percent of Minnesota nonpublic schools are Catholic, 13 percent are Lutheran and 3 percent are other denominational or private schools. There are 260 Catholic parochial schools in Minnesota and there are 182 Catholic parochial schools in St. Paul-Minneapolis. There are 1,394 teachers in the Catholic parochial school system (T.-730; Exh. 81).

REASONS FOR DENYING THE WRIT

The Minnesota Supreme Court decision is in firm and complete accord with previous decisions of this Court.

The Minnesota Supreme Court correctly held that this Court's recent rulings control all of the issues presented by the Minnesota Tax Credit Payment Act, which rulings clearly eliminate the tax credit approach to public funding of nonpublic schools.

The Minnesota Supreme Court based its rulings on four decisions of this Court on June 25, 1973, and this Court's denial of certiorari in a quite similar Ohio tax credit case, and summary affirmance of a California Federal Court decision invalidating a quite similar California tax credit plan (A.-119, 126). A brief description of these cases is as follows:

1. *Committee for Public Education and Religious Liberty, et al. v. Nyquist, et al.*, 413 U.S. 756, 93 S. Ct. 2955, 37 L. ed. 2d 948 (1973), invalidating New York financial aid programs for nonpublic elementary and secondary schools:

a) direct money grants to nonpublic schools serving high concentrations of pupils from low income families for maintenance and repair;

b) tuition reimbursement plan for parents of nonpublic school children with taxable income less than $5,000;

c) tax credits to parents of nonpublic school children failing to qualify for tuition reimbursement.

2. *Sloan, et al. v. Lemmon, et al.*, 413 U.S. 825, 93 S. Ct. 2982, 37 L. ed. 2d 939 (1973), invalidating a Pennsylvania tuition grant, parent reimbursement act for parents of children attending nonpublic elementary and secondary schools.

3. *Levitt, et al. v. Committee for Public Education and Religious Liberty, et al.*, 413 U.S. 472, 93 S. Ct. 2814, 37 L. ed. 2d 736 (1973), invalidating New York legislation appropriating 28 million dollars to reimburse nonpublic elementary and secondary schools for expenses of services, including tests, examinations, enrollment records, health record, personnel records and various other reporting to the State.

4. *Hunt v. McNair*, 413 U.S. 734, 93 S. Ct. 2858, 37 L. ed. 923 (1973), invalidating a South Carolina scheme for aiding colleges by issuance of revenue bonds for proj-

ects, whereby colleges convey projects to state authority, which lease back and reconvey on payment of bonds.

5. *Kosydar v. Wolman*, 353 F. Supp. 744 (S.D. Ohio 1972), certiorari denied, sub nom. *Grit v. Wolman*, 413 U.S. 901, 93 S. Ct. 3062, 37 L. ed. 2d 1021 (1973), invalidating Ohio's tax credits to parents with children in nonpublic elementary and secondary schools.

6. *Franchise Tax Board of California v. United Americans for Public Schools*, — U.S. —, 95 S. Ct. 166, 43 U.S. Law Week 3224, invalidating California's tax credits to parents with children in nonpublic elementary and secondary schools.

The Minnesota Supreme Court opinion below examined extensively the six-judge majority opinion of Mr. Justice Powell, in *Nyquist, supra* (A.-119-127). Petitioners' central argument here is that the Minnesota Supreme Court opinion below departed from this Court's ruling in *Nyquist* and related cases and fashioned itself a so-called "any effects test." There is no factual basis for this assertion.

The Minnesota Supreme Court firmly embraced this Court's three-part standard for analyzing questions arising under the Establishment Clause of the First Amendment A.-117, 118). The Minnesota Supreme Court noted that in each of the cases before this Court, the Court had little difficulty in passing over the issue of secular purpose, and coming to grips with "the crucial question" of the primary effect test of whether its (legislative program) principal or primary effect advances religion. *Tilton v. Richardson*, 403 U.S. 672, 679, 91 S. Ct. 2091, 29 L. ed. 2d 790, 799 (1971) (A.-118).

The Minnesota Supreme Court noted the Minnesota trial

court found the Minnesota Act to have a valid secular purpose and stated its accord with that holding (A.-118). The Minnesota Supreme Court noted that the Minnesota trial court found the statute survived entanglement challenges, but in disposing of the Minnesota Act on primary effect grounds, stated that it need not consider the entanglement issue (A.-118, 119, 127).

The Minnesota Supreme Court firmly based its holdings upon this Court's majority decision in *Nyquist* and related cases, that the primary effect of the Minnesota Act is to aid religion. The Minnesota Supreme Court did not fashion a new test in place of this Court's primary effect test, as mistakenly advanced by the Petitioners.

The Petitioners would have this Court believe that it adopted a so-called "any effects test," whereas, in truth, the Minnesota Supreme Court majority decision, and to a greater extent the concurring decision merely expressed some understanding with the views of Mr. Justice White's dissent, while adhering to this Court's majority in *Nyquist* and related cases.

A full quote of the Minnesota Supreme Court which underscores this fact is as follows:

> The dissenting opinions expressed some dismay at the majority's aparent attempt to distinguish the Walz decision on the basis of historical precedent of granting tax-exempt status to religious and charitable institutions. However, Mr. Justice White most clearly recognized the real departure from recent precedent when he stated: "* * * But the test is one of 'primary' effect not *any* effect." 413 U.S. 813, 823, 93 S. Ct. 2993, 2998, 37 L. ed. 2d 982, 987 (A.-123).

By stating its view that *Nyquist* is an "any effects test" and that it has chartered a new course, giving clear prefer-

ence to the Establishment Clause over the Freedom of Exercise Clauses of the First Amendment, the Minnesota Supreme Court has not substituted a new test for this Court's majority ruling on primary effect in *Nyquist* (A.-126-127). The Minnesota Supreme Court clearly stated that they have "reached the disposition of this issue *on the basis of the primary effect test as it now exists . . .*".

The Minnesota Supreme Court adopted the majority ruling in *Nyquist*, analyzed it correctly in its extensive analysis (A.123-127), and applied it in this case.

The Minnesota Supreme Court correctly found that the encompassing language of *Nyquist* clearly disposed of all the arguments raised by the Petitioners, which sought to distinguish the Minnesota case from the holding in *Nyquist* (A.-126).

The Minnesota plan, like *Nyquist*, involves grants which are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them. The Establishment Clause is violated whether or not the actual dollars given eventually find their way into sectarian institutions; whether the grant is labeled a reimbursement, a reward or subsidy, its substantive impact is still the same. *Nyquist, supra,* 413 U.S. at 786, 93 S. Ct. at 2972.

Petitioners attempted to distinguish the Minnesota Act by pointing out that the Act provided a formula whereby maintenance costs were determined and then reduced by 20%, the remaining 80% was termed a restricted maintenance cost, which fit into the credit payment formula (T.-62, Ct. Finding 37, A.-77). Petitioners argue that the reduction of the maintenance cost to 20% insured that no aid would apply to any sectarian portion of nonpublic education.

This Court rejected two provisions which had similar statistical formulae. First, the Court in *Nyquist, supra,* rejected the maintenance and repair provision notwithstanding that the legislature had provided a 50% limitation:

> Quite apart from the language of the statute, our case is made clear that a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education. * * * Our cases, however, have long since foreclosed the notion that mere statistical assurance will suffice to said between the Scylla & Charybdis of "effect" and "entanglement". *Nyquist, supra,* 413 U.S. at 778, 789, 93 S. Ct. at 2968, 2973.

Further, the Minnesota Supreme Court noted that Minnesota's Tax Credit legislation was "quite similar" to that of Ohio and "similar' 'to that of California (A.-126).

The *Kosydar* tax credit statute is almost identical to the Minnesota tax credit plan. There is a statutory maximum, as there is in our case; it is a dollar-for-dollar rebate, as in our case; there is a provision for payment from the "tax refund rotary fund" where the total amount of credit exceeds the total state income tax liability, as in our case, with the only difference that Kosydar is limited to the total amount of taxes in all categories paid to the state—the practical effect is the same.

Further, the Ohio act covers broader categories of beneficiaries, other than parents, than the Minnesota Act. As shown in *Nyquist, supra,* and *Levitt, supra,* the more narrow the class, the greater the constitutional infirmity.

Also, the *Kosydar* tax credit statute attempted unsuccessfully to avoid entanglement problems and to attempt insulating sectarian education from aid by limiting the

increase to 25% of the maximum credit for the preceding school year and limting to credit to a taxpayer to 50% of the state-wide average expenditure from all sources for current expenses per public elementary and secondary school pupils for the year ending in the taxable year. This is similar to the Petitioners claim here that the 80-20% formula insulates sectarian activities from aid.

CONCLUSION

The Minnesota Supreme Court reached the disposition of this on the basis of the primary effect test as it now exists. The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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